# In the Supreme Court of the United States.

OCTOBER TERM, 1924. No. 671.

*Coronado Coal Company*, et al., *Plaintiffs-in-Error*,

vs.

*United Mine Workers of America*, et al., *Defendants-in-Error.*

## PETITION FOR REHEARING.

Plaintiffs-in-Error in the above entitled case, respectfully petition for a rehearing of the same.

Near the close of the Court's opinion relative to National liability, the Court says:

> "In our previous opinion we held that a trades-union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them on; but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done *was done by their agents in accordance with their fundamental agreement of association.*"

The opinion of the Court holding the National organization not liable proceeds on the assumption that the only substantial new testimony in the present record on this branch of the case is that of McNamara, and

that the sole agent by which it is sought to implicate the National is President White.

In this assumption the Court apparently overlooks the testimony of defendants' own officers and witnesses, White and McLachlan to the effect that, in destroying plaintiffs' plant, the District organization was acting pursuant to the duty imposed on it by their fundamental agreement of association, to protect the National and the other Districts from the competition of open shop coal.

At the second trial, President White testified that one of the recognized functions of the District organizations was "to keep all the union mines organized" (Rec. 2124) and that when a union mine attempted to turn open shop within an organized District, the solution of the resulting menace to the organization "would be up to the District of that jurisdiction" (Rec. 2117).

The very testimony which the Court now holds sufficient to warrant the finding that the specific purpose of the District was to restrain interstate commerce, also establishes, it is submitted, that the District officers and members were not (as previously appeared) pursuing a private venture, but were acting pursuant to their recognized duty to the organization, to attain its fundamental objectives.

We feel sure that the Court does not intend to modify the fundamental doctrine of agency, that a principal cannot clothe his agent with the duty of attaining a specified object, by methods approved by past practice between them, and at the same time limit his liability for the proximate results of the agent's action, of which the principal accepts the primary benefit.

Two provisions from the National Constitution are quoted by the Court in this connection. Neither of these provisions, it is submitted, controls the solution of the problem presented by the new testimony in the present record.

In the first place it is submitted that the purpose of these provisions was merely to define the responsibility of the National and the District Branches, as between one another, to provide strike benefits to their members and not to attempt to limit or distribute any possible liability on their part to third persons, which, until this Court's decision in 1922, no union man believed possible.

Also, suppose the Constitution had provided "Whenever non-union men are employed in a mine, all members shall strike, but the District organization alone shall finance such strikes." While this might, as between the National and the District, have warranted the National in declining to pay strike benefits in open shop strikes, it could have no effect on the liability of the National to *third persons* for the consequences of what the National Constitution made it the duty of the District to do for the benefit of the entire association.

It is submitted that there is a failure in the opinion to distinguish between the regulation of the mutual *rights* of the agent and the principal to one another, and the definition of the *duty* of the agent in pursuance of his principal's business as affecting the principal's liability to third persons.

Finally, even if these provisions were intended to limit the liability of the principal for the acts of its agents, and even assuming that such would be legally possible, the provisions do not cover the present situation.

> "Districts may *order* local strikes within their respective districts on their own responsibility, but where local strikes are to be financed by the International Union, they must be sanctioned by the International Executive Board."

There was no testimony in the present record which would warrant, must less necessitate, the conclusion by the jury that the strike at Prairie Creek was *ordered* by District No. 21. Defendants' witness McLachlan, the

District Board member in charge of the strike, testified clearly (Rec. 2149) that it resulted automatically from the provision in Article XIV, Section 10, of the National Constitution providing that "Any member going to work in a non-union mine shall forfeit his membership." Since the Court expressly finds that the International Union was not asked to finance this strike, no sanction of the National Board for this purpose was necessary.

> "No district shall be permitted to engage in a strike involving all or a major portion of its members, without the sanction of an International Convention or the International Executive Board."

Even assuming (as does not appear), that this strike involved all or a major part of the members of District 21, the express sanction of the National Board would not be necessary to justify the District members in refusing to work open shop, otherwise the express prohibition of Article XIV, Section 10, above quoted, would be nullified.

The Constitution does not purport to limit or to define the functions and duties of the District and Local Branches in carrying on the activities of the National Body, which created them for this sole purpose and on which their continued existence depends. Nor does it attempt to specify what the District branches shall or shall not do when a union mine turns open shop and a strike automatically results.

Such functions may therefore properly be ascertained by the admissions of their responsible officers and from actual practice, the latter being in such case as much a part of their fundamental agreement of association as the words themselves.

The new testimony of White and McLachlan was ample, it is submitted, to warrant the jury in finding that, "in accordance with their fundamental agreement

of association" it was the duty of the District, in such cases, to take proper steps to prevent the continuance of the menace to the organization which the presence of a non-union mine in a unionized field necessarily entailed. What such steps should be was further shown by past practice, detailed in the rejected offers, which were also new to the present record.

In view of the established rule that, with a verdict directed against us, we are entitled to every inference from the testimony in our favor, we submit that the Trial Court, in taking the case from the jury, assumed to itself the proper function of that body. All we are now asking is to have our case submitted to the jury.

The Court holds McNamara's testimony sufficient to render White *personally* liable, but that the organization of which he was president is not liable because, in spite of the broad powers imposed on him, he was not authorized to bind it, and showed a purpose to absolve it from liability.

It is not suggested that White had any *personal* or private motive for destroying plaintiffs' property, or any conceivable object other than the furtherance of the business of his organization.

Reduced to its elements, therefore, this decision means that labor unions, unlike business corporations, may create officers and Branches, clothe them with the broadest powers, charge them with the duty of carrying on recognized activities for the attainment of the essential objects of the association, secure all the intended benefits thereof, and at the same time escape all responsibility, leaving their victims to seek satisfaction from the financially unresponsible actors and the District Branch whose funds and organization the parent body can so easily manipulate to preclude all substantial redress.

With the profoundest respect for the Court, and with

the most earnest desire to be convinced by its judgments, we cannot bring ourselves to square such a decision with the other judgments of this Court, nor can we believe that this Court will ultimately allow such a situation to persist.

The purpose and hope of the present petition is that if, as we sincerely believe, the Court is ultimately to apply to these Labor organizations the same principles of respondeat superior, and the same standards of liability and responsibility as have so long been applied to business organizations, the Court may so announce the law in this case, before it is too late for our clients to secure thereby the redress to which we believe them so clearly entitled.

Respectfully submitted,

HENRY S. DRINKER, JR.,
*For Petitioner, Plaintiff-in-Error.*

I certify that I present the foregoing petition, not for delay, but in the sincere belief that in reaching the decision which the petition seeks to have reconsidered, the Court has overlooked essential testimony, has failed to follow established principles of law, and that a great injustice will otherwise result to my clients.

HENRY S. DRINKER, JR.

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# In the Supreme Court of the United States.

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OCTOBER TERM, 1924. No. 671.

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*Clyde H. Finley, Receiver, and Coronado Coal Company, Denman Coal Company,* et als., *Plaintiffs-in-Error,*

vs.

*United Mine Workers of America, District No. 21, P. R. Stewart, Fred Holt,* et als., *Defendants-in-Error.*

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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## BRIEF FOR DEFENDANTS-IN-ERROR.

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### PRELIMINARY STATEMENT.

This case is now before this Court for the second time. The opinion on the former writ of error is to be found in 259 U. S. 344.

The first writ of error was sued out by the defendants-in-error here, to reverse a judgment of the District Court for

NOTE:—All italics herein are ours, unless otherwise stated.

the Western District of Arkansas, based upon the verdict of a jury, and which said judgment was affirmed by the Circuit Court of Appeals of the Eighth Circuit (258 Fed. 829), and upon the hearing in this Court the present plaintiffs-in-error (then defendants-in-error) were entitled to the benefit of all the facts presented by the record and any reasonable inferences properly deducible therefrom.

This Court held, after a review of all the facts appearing in the very full record, that;

(1) There was no substantial evidence that the International Union United Mine Workers of America "initiated, participated in or ratified the interference with plaintiffs' business," and that the trial Court should have directed a verdict for the International Union United Mine Workers of America, its president and its officers.

(2) "There was no evidence submitted to the jury upon which they properly could find that the outrages, felonies and murders of District No. 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce," and that the District Court should have directed the jury "to return a verdict for the defendants."

The jurisdiction of the District Court was based entirely upon the Sherman Anti-Trust Act, and especially Section 7 thereof, and unless the conspiracy alleged was such as "to restrain or monopolize interstate commerce," the District Court of the United States had no jurisdiction. This Court, in reversing the case, held that there was no evidence in the record of "a conspiracy to restrain or monopolize interstate commerce." The case went back to the District Court of the United States for a re-trial, in light of the opinion of this Court, and when all of the evidence was in, the question confronting the Judge of that Court was whether there was any substantial change in the case as presented to this Court on the former record, and whether the evidence was sufficient to establish the jurisdiction of the Court under the Sherman Act and the opinion of this Court.

At the second trial in the District Court, there had been no amendment of the pleadings; the issues presented were precisely the same as on the first trial. At the conclusion of the evidence, the Court below directed a verdict for the defendants, saying in part, as follows (Record, 2237):—

> "Now, the trouble of this case was, and the trouble with this case will always be this: The mining of coal comes under the law of the state; it is in no sense interstate commerce. Coal itself when mined may become the subject of interstate commerce, but is in no sense interstate commerce. A man can mine all the coal he wants with the intention that he will ship it to some other state, yet there is no interstate commerce in that whatever; because if so, and the framers of the Constitution couched it in such language, unless in the Cotton case where they were monopolizing all of the cotton industries,—so this conspiracy was formed here which resulted in the destruction of this property and the loss of the lives of those two individuals, and was formed to prevent Mr. Bache from working his mines non-union. Now, if Mr. Bache had given a bond that he would not ship a carload of coal out of this state if they would let him work his mines there peaceably, these union men would not have done that. They were bound and determined he should not work that mine non-union. Is that not what is established by the evidence here? It is true Mr. Bache, if he had been permitted to have gone ahead there and mined coal, undoubtedly would have shipped some coal in interstate commerce, but that is not interstate commerce. I don't care how much he intended to ship in interstate commerce. Now, you take the utmost that is here contended, and it is this; and I have watched carefully for it, that had it not been for this conspiracy Mr. Bache would have increased the operation of those mines by non-union men one-third or sometimes almost one-half more than they were producing, working under the union scale, and that this coal would have

gone into interstate commerce, and would have extended the field in which it might have been distributed and sold in competition. Now, we had evidence of that, but that again is not interstate commerce. What is established by this case is that there was a conspiracy down there, and as a result of that conspiracy this property loss occurred. Of course everything tended to work it up. You take in cases of excitement and prejudice and so forth, and if Mr. Bache had said, 'I am not going to ship any more coal in interstate commerce, with these men working for me I can mine it cheaper and can sell all my coal in Arkansas,' still I don't think he could, but if he said those things, they would have said, 'No, you cannot work non-union, because we are union men, and we must uphold our union, we must uphold our right to better our conditions and our wages, and protect ourselves, and we will not allow you to work non-union.' Now, to my mind that is this case.

"I don't think it can ever be a different case, but while I think the conspiracy, at least to a certain point, is amply established, I don't think that there is evidence here that it was the direct purpose to interfere with or monopolize interstate commerce. It was for a different purpose, and that was a mere incident to it.

"In seeing it as I do, and treating the entire matter as I do,—now, there are little scraps of testimony here and there, but after all it is what reasonable minds would agree upon as to their intention, and that was that they were not going to allow him to operate that mine. But the operation of that mine, the bringing up of coal, and the coal when brought up, or the fact that it would in future be shipped in interstate commerce, is not any interference with interstate commerce from the earliest case, Kidd vs. Pearson, 128 U. S., which is one of the most illustrious cases, and I have been looking at that, and that is my idea about the merits, and I will have to sustain this motion for an instructed verdict."

The Court thus found that there was no substantial change in the case from that made on the former record and that there was no evidence in the record justifying the charge that the defendants were engaged in a conspiracy forbidden by the Sherman Anti-trust Act, and therefore, it necessarily followed that the Court was without jurisdiction.

A verdict having been entered in the District Court in favor of the defendants, a writ of error was sued out by the plaintiffs below in the Circuit Court of Appeals for the Eighth Circuit, and the case was heard by Circuit Judges Sanborn, Lewis and Kenyon, and the opinion of the Court was delivered by Kenyon, Circuit Judge. (300 Fed. 972.)

The Circuit Court of Appeals affirmed the judgment of the District Court holding that there was no substantial change in the case on second trial from what it was when this Court passed upon the questions when the case was before it, and the Court concluded, at page 980:—

> "We think the trial Court was correct when he said in summing up this case and holding that the alleged conspiracy was for the purpose of unionizing the mines and of preventing Mr. Bache from working his mines non-union;
>
> " 'I don't think it can ever be a different case; but while I think the conspiracy at least to a certain point, is amply established, I don't think there is evidence here that it was the direct purpose to interfere with or monopolize interstate commerce. It was for a different purpose and that was a mere incident to it.'
>
> "We are satisfied there is no such substantial change in the proof here from that of the former case determined by the Supreme Court as to constitute a new case. It is the same case, and the law announced there is the law of this case. Even granting the record here to be stronger than in the previous trial on the question of the intent of the alleged conspiracy, yet in the light of the decision there it fails to change the status of the International organization as to liability, and fails to show that the direct intent of the con-

> spiracy as to District No. 21 and its officers and subsidiary unions was to restrain or monopolize interstate commerce. The judgment of the trial Court is affirmed."

Counsel for the plaintiffs, in the Court below, and again in the Circuit Court of Appeals, treated this case as if it was only necessary for them to produce cumulative evidence upon exactly the same issues which had been presented in this Court, and in the discussion of this record hereafter, we think it is easily shown that there was nothing new in the present record and that all of the new testimony was simply cumulative to that contained in the former record. Indeed in their Reply-Brief (page 4), in the Circuit Court of Appeals, Counsel for plaintiffs-in-error were frank enough to say to the Court:—

> "It is entirely true that in the first record we offered testimony which we then argued was sufficient to support circumstantially and by inference all the conclusions of fact which in the present record we contend are shown both by new and much stronger circumstantial evidence and also directly."

And in their brief in the Circuit Court of Appeals, at page 114, Counsel for plaintiffs-in-error complain that:—

> "During the trial, Judge Pollock although recognizing that in theory it was a new trial, apparently was influenced to a great extent by the Supreme Court's impression of the facts."

If the first record contained circumstantial evidence and inferences from facts shown, to support all the conclusions which are contended for by plaintiffs-in-error, on the present record, and if the difference between the records is that there is additional new evidence of the same facts, and that the circumstantial evidence is stronger, how can it possibly be contended that there was a new case made on the second trial, in the sense that that term is used in the law?

It is idle for plaintiffs-in-error in the second quotation above set forth, to refer to the conclusions of this Court from the facts, as its "impression of the facts."

As was well said in the case of Taenzer & Company *vs.* Chicago R. I. & P. Railway, 191 Fed. 543, at page 547:—

> "The rule is too well settled to require more than the merest reference to authority that *every question of fact or law* which was before a Circuit Court of Appeals *upon a writ of error* and decided by its opinion *is conclusively settled both for such Court and the Court below in further proceedings in the same action and that the finality of such decision as respects questions actually decided is not affected by the fact that the judgment was one of reversal and direction of new trial.*" (Citing cases.)
>
> D'Arcy *vs.* Jackson Spring Co., 212 Fed. 889-892.

Later in this brief, we shall analyze the "new testimony" and its relation to the facts and inferences therefrom, appearing in the former record before this Court. We expect to show that there was no new evidence, not cumulative in its nature, and that the Court was not required to take the opinion of the jury when it appeared that there was no substantial difference in the case then on trial from that wherein this Court had said that the jury should have been directed to find a verdict for the defendants. But before doing this, we wish to state that, in our view of the law, the function of the trial Judge in considering the evidence on the second trial was even broader than that assumed by Judge Pollock, as shown in his opinion above referred to.

THE COURT MIGHT PROPERLY HAVE DISMISSED THE CASE AT THE CONCLUSION OF THE EVIDENCE.

After the evidence of the plaintiffs and defendants had been fully heard, the same question confronted the Judge

of the District Court as confronted this Court on the former record, to wit: was there evidence that the plaintiffs had been injured as the result of a conspiracy on the part of the defendants "to restrain or monopolize interstate commerce?" *This was clearly a jurisdictional question,* for the only ground of the jurisdiction of the District Court was that the defendants had been engaged in a conspiracy in violation of the Sherman Anti-trust Act. And if the District Judge came to the same conclusion on the evidence before him, that this Court came to on the former record, it was the duty of the District Court to proceed no further in the case, but to dismiss the same.

Section 37 of the Judicial Code provides:—

> "If in any suit commenced in a District Court, or removed from a State Court to a District Court of the United States, it shall appear to the *satisfaction of the said District Court,* at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court *shall proceed no further therein,* but shall *dismiss the suit* or remand it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just" (5th Fed. Stat. Ann. 398).

The District Court found that there was no evidence to sustain the contention that the defendants had been engaged "in a conspiracy to restrain or monopolize interstate commerce," and upon such finding, under the statute, the Court was directed to proceed no further, but to dismiss the case, and the District Court Judge did what is tantamount thereto, to wit: directed the jury to find a verdict for the defendants.

In passing upon the facts of this case, the District Judge was no mere moderator, but a jurisdictional fact being in issue, he was required, himself, to make a complete survey of the evidence offered for the purpose of determining whether "it shall appear to the satisfaction of said District Court" that the case is one of which this Court had jurisdiction. Of course the exercise of this judgment by the District Court is reviewable, but in the first place, it is incumbent upon him to exercise his judgment and discretion and it is not necessary that he should submit the facts to a jury, but he may pass upon the facts himself, or ask the judgment of the jury, but in the last step his judgment must be convinced.

In the case of Gilbert *vs.* David, 235 U. S. 561, this Court said, at page 568:—

> "It is also insisted that the Court erred in itself considering the testimony and in not submitting the issue to the jury. But while the Court might have submitted the question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the Court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject."

The question in Gilbert *vs.* David, was whether the evidence showed diverse citizenship of the parties, justifying the jurisdiction of the District Court, just as in this case the question was whether a conspiracy in restraint of interstate commerce had been shown as the basis of the jurisdiction. Therefore, we contend that when the District Court reached the conclusion that it had not been shown to its "satisfaction" that the defendants had been engaged in a conspiracy in violation of the Sherman Act that he should have dismissed the case, and that in directing a verdict for the defendants, the Court accomplished the same result, and this Court in reviewing the action of the District Court will not reverse that Court on the ground that there was a scintilla of evidence, tending to show the

jurisdictional fact, but the evidence must have been sufficient to satisfy the District Court and to satisfy this Court, that the jurisdictional facts were sufficiently proven.

THE FINDING OF THE DISTRICT COURT AS TO WHETHER THERE WAS SUBSTANTIAL CHANGE IN THE FACTS SHOWN IN THE FORMER RECORD IN THIS COURT.

On the second trial of this case, the District Judge was confronted with an additional question of law at the end of the testimony.

This Court had laid down the law of this case and had discussed fully, and announced its conclusion upon, the facts as they appeared in the former record, and the question presented to the District Court was whether upon the second trial the plaintiffs made a new case, substantially different from that passed upon by this Court on the former record, for unless a substantially new case was presented, the District Court was bound by the conclusions of law and fact announced by this Court in its opinion.

The law as to this is well stated in the case of National Surety Company *vs.* K. C. Company, 182 Fed. 54 at page 56 (Eighth Circuit), as follows:—

> "All questions of law determined on a first writ of error become, if the facts remain substantially the same, the law of the case both for the trial Court and for this Court on a second writ of error."
>
> Beiseker *vs.* Moore, 174 Fed. 368 (8th Circuit) and cases cited.

The answer to the question above, which presented itself to the District Court, involved a consideration of the facts in the former record, and of the opinion of this Court thereon, neither of which was available to the jury. And the logical consequence was that in the light of the opinion of the Supreme Court, the trial Judge was charged with the duty, and clothed with the responsibility, of making a survey and appraisal of the testimony on the former record, con-

trasting it with the testimony that appeared in the second trial, and reaching a correct conclusion as to whether there was any substantial difference in the facts. And while from time to time during the prolonged trial "little scraps of testimony here and there" as stated by the District Court, may have appeared on the second trial, which did not appear in the former record, yet it was the duty of the District Court to pass upon the question of whether a real and substantial difference existed in the two records. And that Court having reached the conclusion that the facts upon the two trials were practically and substantially the same, it was his duty to have directed a verdict for the defendants in accordance with the opinion of this Court, and his action should only be reversed, if upon a review of the record in both cases, this Court should determine that there was a real, substantial and sufficient difference in the facts presented by the two records.

## I.

## ASSERTION BY PLAINTIFFS-IN-ERROR, IN POINT II, OF THEIR BRIEF, OF LIABILITY OF THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA.

This Court fully considered the liability of the International Union in its opinion upon the former record. Plaintiffs-in-error have entirely mistaken, as shown by their brief, what this Court held in its opinion in this case.

At page 63 of their brief, plaintiffs-in-error say that "The defect which this Court found with plaintiffs' original case as to the liability of the National Organization" was that "it involved too many inferences unsupported by proper proof" and, we submit, that there is nothing in the opinion of this Court to sustain any such statement. Plaintiffs-in-error again say in their brief, page 63, that "The first record was lacking in *direct proof* that the National Organization had participated in the attack at Prairie Creek and showed the District Officers and members as the sole active participants," and that they were therefore "compelled to rely on

the theory that the District and its officers and members were agencies authorized by the National to bind it for torts committed in the course of strikes." It is true that this contention was made by plaintiffs-in-error in this Court and in reply thereto the Court said (259 U. S. 344), at page 395:—

> "But it is said that the District was doing the work of the International and carrying out its policies and this circumstance makes the former an agent. We cannot agree to this in the face of the specific stipulation between them that in such a case unless the International *expressly assumed* responsibility the District must meet it alone. The subsequent events showing that the District did meet the responsibility with its own funds confirm *our reliance upon the constitution of the two bodies.*"

The plaintiffs-in-error contended that the International Union had "initiated, participated in or ratified the interference with plaintiffs' business which began April 6, 1914, and continued at intervals until July 17th," and this question of initiation, participation or ratification is the very question discussed by this Court in its opinion, holding that "the strike was a local strike" and that there was nothing to show "that the International Board ever authorized it, took any part in preparation for it or in its maintenance," nor "did they or their organization ratify it by paying any of the expenses" and that "it came exactly within the definition of a *local strike* in the constitutions of both the National and the District organizations."

Plaintiff had introduced evidence that White, the President of the International Union, had heard of the trouble on April 6th at Prairie Creek, and that he reported this to the Board in a speech, which the Court states, at pages 393-4, shows "sympathy" with the purpose of the riot on April 6th and "a lack of respect for law." It further appeared in the record, referred to by this Court, that White made a long speech at a special convention of District 21 in May, 1914, and that in 1916 after Stewart, President of District 21,

had been convicted of conspiracy to defeat the injunction issued to protect Prairie Creek mines in this conflict, and had gone to the penitentiary and had been pardoned, that White wrote a letter to the President thanking him, and subsequently appointed Stewart to a position on a District Committee.

The former record contained the same evidence as to the publication of the Mine Workers Journal under the authority of the Board of the International Union, and in the former record, as well as this, copious extracts are in evidence from the columns of the Journal published by authority of the Board and urged by the plaintiffs as showing approval and ratification by the International Union of the riot of April 6th, and the destruction of property on July 17th.

The plaintiffs-in-error on the former record did not rely entirely upon the question of agency, which was disposed of by this Court in its opinion as above quoted, but insisted that the evidence introduced on the former record showed that the International Union had actually "initiated, participated in or ratified the interference with the plaintiffs' business" and on the former record upon this question, the plaintiffs were entitled to the benefit of every fact shown in the record and every reasonable inference therefrom. And this Court held that there was no competent evidence in the record that the International Union had "initiated, participated in or ratified the interference with plaintiffs' business." On the question of the agency of District 21 for the International Union, the Court further said, at page 395:—

> "Here, it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency which the constitutions of the two bodies *settle conclusively.*"

This Court held that the constitutions of the International Union and District 21 "settle conclusively" the question of agency and that the evidence relied on did not tend to show

liability of the International Union because whatever White, the President did or may have said, that "it would be going very far to consider such acts of the President alone a ratification by the International Board creating liability for a past tort. The President had not authority to *order or ratify a local strike. Only the Board could do this.*"

Notwithstanding the finding by this Court that White, the President, could not "order or ratify a local strike" and that "only the Board could do this," and although there was evidence in that record from which the jury could have found White's approval of the occurrences at Prairie Creek, the plaintiffs-in-error now claim that they have shown on this record additional new statements by White and that thereby have created a new case. Under the decision of this Court, it was not a question of how many statements White may have made, or what may have been the purport thereof, this Court held that he could not by any order of his, or by any ratification by him, create a liability upon the International Union.

Plaintiffs-in-error at page 64 of their Brief state that it is not their "thought to re-argue any of the questions decided on the former writ of error," and then, on pages 65-66, proceed to re-argue the effect of the constitution of the International Union and of District 21, which constitutional provisions were thoroughly discussed in the opinion of this Court on the former record; and in fact all of the constitutional provisions of the National Union and District 21 were fully considered by this Court.

Plaintiffs-in-error then present the question of the liability of the International Union under five sub-headings, which we will now discuss in their order.

Plaintiffs-in-error claim, Brief, page 67:—

> **"1. The destruction was effected in the prosecution of the business and primary object of the National Organization."**

Plaintiffs-in-error claim that "on the original record this Court held that there was not sufficient testimony to war-

rant a finding that the acts of the District officers and members for which it was there sought to hold the National body liable, were committed in the course of the business of the latter, or pursuant to the general policy which it had adopted."

This Court did not so hold, but in answer to the plaintiffs' claim that District 21 was an agency of the International Union in connection with the matters at Prairie Creek, this Court said, at page 395:—

> "But it is said that the District was doing the work of the International and carrying out its policies and this circumstance makes the former an agent. We cannot agree to this in the face of the specific stipulation between them that in such a case unless the International expressly assumed liability—the District must meet it alone."

And again this Court said:—

> "Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency which the *constitutions* of the two bodies *settle conclusively.*"

Whatever evidence there is in this record as to "the business and primary object of the National organization," exactly the same evidence was in the former record before this Court, and the only suggestion of any difference between the two records is the fact that White, the President, testified that it was one of the objects of the District to keep "all the Union mines organized" and that McLachlin, a District Board member, testified at the second trial that "when the Bache-Denman Company started to employ non-union men" that "no action at all was necessary by the District or local officers in that connection." He further testified in addition to the quotation set out in the brief

of the plaintiffs-in-error that no strike action on the part of the District was necessary because Mr. Bache had done that in locking the men out, and saying that "no union men could work with non-union men;" and that it was not necessary for the District officers or anybody else to tell the union men not to work there because "Mr. Bache had done that himself." (Record 2149.)

All the evidence on the question of the "business and primary object of the National organization," as well as of the District organization under the Constitutions of those two bodies was before this Court on the former record, and was fully reviewed on the question of what was the business of the National Union and whether the District was carrying out its policies as agent. This Court held that "the Constitutions of the two bodies" settled that question "conclusively."

Plaintiffs-in-error claim (Brief, page 70) that the District officers and members "were acting not independently" but "as a functioning part of the main organization," and we submit that that very question, with all of the facts appearing in the present record, was specifically passed upon by this Court.

Plaintiffs-in-error claim in the second sub-heading (Brief, 71) that:—

> **"2. There was competent new testimony for submission to the jury that the destruction was initiated, participated in and ratified by the National Body."**

This Court held, on the former record, that there was no "substantial evidence" that the International Union "initiated, participated in or ratified the interference with plaintiffs' business," but plaintiffs-in-error now claim that the present record contains "new and substantial proof, both direct and circumstantial, of National participation" (Brief, 71) and they proceed to discuss this alleged new evidence under three sub-headings, as follows:—

"1. GENERAL DIRECTIONS BY NATIONAL OFFICERS TO OFFICERS AND MEMBERS OF DISTRICT 21 TO PREVENT THE SHIPMENT AND COMPETITION OF OPEN SHOP COAL."

It is said that there are two extracts from the convention proceedings of District 21 for the year 1912, that were not in the former record, one from a speech by National Secretary Green (Record, 332) and the other from a speech by National Vice-President Hayes (Record, 333), but the former record in this Court contains nearly a thousand of pages of such extracts. It cannot be said that the extracts in the former record prove only competitive conditions between West Virginia and the Central Field, as they affect the Union scale. The inference was, and was so urged in this Court, that similar conditions prevailed throughout the country, including Arkansas and the southwest; and they only could have been introduced on the ground, that they illustrated the policy in District 21 and the relations between the Union operators and Union miners in that District.

This Court's opinion could only give a general survey of the evidence in the record, but in the opinion is a clear recognition of the inference that the same conditions prevailed in District 21 that it is now claimed the speeches of Hayes and Green disclose: "The stimulation of Union leaders to press their unionization of non-union mines not only as a direct means of bettering the conditions and wages of their workers, but also as a means of lessening interstate competition for union operators, which in turn would lessen the pressure of those operators for reduction of the union scale or their resistance to an increase." 259 U. S. 344, at page 408.

On the former trial, Mr. Traer, a witness for the plaintiffs, was asked about the discussion between the operators and union leaders of competitive conditions of other fields than the Central Competitive Field (former Record, 2641-2):—

"Q. Mr. Traer, I meant to ask you, in connection with your answer, that the principal non-union competitive field referred to in the 1899 conference was West Virginia, what other non-union fields came into the discussion at a later date?

"A. Western Kentucky and what we called the Southwest, comprising Kansas, Oklahoma and Arkansas, became subjects of discussion as to competitive conditions."

This record contains nothing novel or new in the matter of testimony showing union members and officers discussing competitive conditions existing in District 21 by reason of non-union production. In the opinion of this Court, 259 U. S. 344, 405, is set out a Resolution introduced in the International Convention, by a local union of District 21, in respect to the competition of non-union coal from Colorado:—

"RESOLVED, That in strict compliance with our obligations and teachings, we accord a hearty approval to our National Board on its action in regard to District No. 15, strike, now on in Colorado, and whatever action taken by the National that in their judgment is necessary to the successful ending in the elevating of the craft in District No. 15 meets our entire approval, for which we pledge our unqualified support, as our knowledge of the field of Southern Colorado in the event of an unsuccessful issue of the trouble now pending would work almost unsurmountable and incalculable damage to District No. 21, as it would be an unjust competition in the same commercial field and could with little effort undersell and supersede us in Oklahoma and Southwestern Kansas markets."

In the opinion of this Court is also set out a speech of W. B. Wilson in 1906, then Secretary of the International organization, who discussed the competitive conditions pre-

vailing in the Southwest as they prevailed in the Central Competitive Field.

On page 540 of the former record appears a report to the National Convention of a Committee for forming scale districts which was offered and introduced according to Mr. Drinker's statement at the time, "for the purpose of showing competitive relations as by that committee adopted at that convention between the various districts and particularly scale District 5, composed of Missouri, Kansas, Indian Territory and Colorado." (Former Record, 540.)

On page 709 to 710 of the former record, is set out the exhaustive testimony of Mr. Bache as to the competitive conditions between coals produced in the various States of the Southwest, including Arkansas.

It is obvious that at the first trial and on the former record, the now plaintiffs-in-error urged that the competitive conditions existing between the Central Field and West Virginia and Kentucky prevailed as well in other districts, including District 21; that by necessary inference the collusive agreement claimed to have been shown between the union operators and union miners of the Central Field, which is fully set forth in the statement of claim or declaration in this case, prevailed between the union operators and union miners of other fields, including the Southwest and Arkansas; in short, that the alleged illegal conspiracy between union operators and union miners existed in District 21, and their complaint so charged. Certainly, this Court may be allowed to state the character of the conspiracy charged, which they did as follows:—

> "The plaintiff's charge that there has been and is a continuously operating conspiracy between union coal operators and the International Union to restrain Interstate Commerce in coal and to monopolize it, and that the work of District 21, at Prairie Creek was a step in that conspiracy for which it can be held liable under the Anti-trust Act." (259 U. S. at page 407.)

Under this sub-head, plaintiffs-in-error refer to the speech of White at the District 21 convention on May 18, 1914,

but it is sufficient to say that this speech was in the former record, and is referred to by this Court in its opinion.

The speech of William Green, referred to in brief of plaintiffs-in-error (page 72) was delivered at a convention of District 21 on February 21, 1912, more than two years before the occurrences at Prairie Creek referred to in the brief, during the course of which he said, in referring to the mining of coal under non-union conditions that "They are taking the market away from our people and we are feeling in the east very keenly the competition coming from these non-union fields and we have to organize them if it does take men and money." (Record, 332.) He then proceeds to say:—

> "That we have to carry our banner of unionism into these fields; and it must be carried there and it will eventually be carried there and the banner of our organization established there just as firmly as in the other organized sections of this country."

On the same day the speech of Vice-President Hayes, referred to in the brief of the plaintiffs-in-error was delivered in which he said (Record, 333):—

> "What every member in our organization needs is a thorough knowledge of the trade agreement system of settling wage differences, is an understanding of conditions all over this country; is an understanding of the non-union fields, and the competitive field relations that enter into the production of coal, and with that knowledge we can safely decide and thoroughly decide, with credit to our organization, with safety to our organization, upon a correct policy. In that way we will protect the life of the organization."

He then proceeds as quoted by plaintiffs-in-error, to assure District 21 of the "fullest co-operation" of the International Union "in protecting the interests and rights of

the membership in this field." How is it possible to even contend that there was anything new in this evidence or the inferences to be drawn from it, which did not appear in the former record of this case?

Plaintiffs-in-error further in their second sub-heading contend (Brief, page 73):—

> "2. THE DESTRUCTION OF PLAINTIFFS' BUSINESS AND PROPERTY WAS PLANNED, ORDERED AND EXPRESSLY RATIFIED BY NATIONAL PRESIDENT WHITE."

Apart from the fact that this Court has held that White as President had no authority "to order or ratify" a local strike, committing the International Union to the results thereof, we insist that it is a *bold statement* of plaintiffs-in-error to say that John P. White "planned, ordered and expressly ratified" the destruction of plaintiffs' property, and there is no justification to be found for such a charge in the former record, or the record now before the Court and upon this question there is no substantial difference between the record now before the Court and the former record.

For this bold statement of the plaintiffs-in-error they rely upon the testimony of James A. McNamara. This man McNamara was one of the leaders in the destruction of the property of the plaintiffs on July 17, 1914.

Let us consider this alleged new evidence in the order of the brief of plaintiffs-in-error, as creating a new case of initiation, participation or ratification by the International Organization. McNamara first testifies that about May 1st, Stewart, President of District No. 21, told the witness that he had been to Kansas City, and had a talk with White and that "they had arranged a plan up there to prevent Bache from producing coal." This was denied by White, but we will consider it in its relation to the evidence in the former record.. In the former record is contained testimony that about April 8, 1914, President White, National Board member Mullen, and District President Stewart, were at Kansas City, and their expense account offered for that purpose at the first trial (as well as at the second) will

be found in the former record, page 2386. In that connection it was pointed out on the previous appeal that President White had made certain declarations to the National Board at its meeting May 4, 1914, which showed familiarity with the occurrences at Prairie Creek, and further that the speech of White at the special convention of District 21 on May 18, 1914, was inciting to militant opposition to non-union operations. From all these facts, it was urged as an inference therefrom, by the now plaintiffs-in-error, that the strike at Prairie Creek was discussed by White who was cognizant of the plan which plaintiffs-in-error now claim is shown by the direct testimony of McNamara. The whole intent of the testimony in the former record above referred to, was to show by circumstances that the Prairie Creek strike was the subject of conference at Kansas City, that White knew about it, concerned himself with it and approved of it. But this Court declined to impose liability on the International organization unless it appeared that it had *expressly assumed authority* by the action of its Executive Board.

The second phase of McNamara's testimony upon this point is that he and Slankard had a conference with White at the Main Hotel in Fort Smith during the convention of District 21 held May 18th-23d. The following is his testimony in this respect:—

> "Q. The convention was the 18th to the 23rd of May?
>
> "A. Anyway, I was in the convention hall, and it was about the second day of the convention. Jim Slankard came to me and said, 'John P. White wants to see us at the Hotel Main after the convention adjourns,' and I said, 'All right, we will stay together.' A little after 12 o'clock when the convention adjourned, we went to the Main Hotel and stayed in the lobby, and in a few minutes White came along.
>
> "Q. Did you know him?
>
> "A. No; he nodded his head for us to follow him to the elevator.

"Q. Did he know Slankard?

"A. I suppose he did, he nodded to him, and we went up in the elevator, and in the parlor on the first floor, and he shook hands with us and said, 'How *is* things at Hartford,' and I told him all right.

"Q. Speak up now.

"A. And he said, 'How is things at Prairie Creek,' and I said, 'Things are a little watery in Prairie Creek No. 4 yet,' and he said, 'Yes, I have been informed on that'; and he said, 'Stewart told me that they can not get enough men to operate the mine.' He said 'If they do that, we must prevent that coal from getting into the market.'

"Q. Did he say why?

"A. Yes, sir.

"Q. Tell it.

"A. He said because if Bache coal, scab dug coal, got into the market, it would only be a matter of time until every union operator in that country would have to close down his mine, or scab it, because the union operators could not meet the Bache competition.

"Q. Did he say any more after that?

"A. Yes, sir.

"Q. What did he say?

"A. He said, 'When you go back to Hartford,' he said, 'I want you to tell the men what I have told you, but don't tell them I have told you.'

"Q. Did he say why not?

"A. Yes, sir, he said he didn't want the National Organization mixed up in this case; he said, 'So far you have handled it, this part, and we have West Virginia and Colorado on our hands, and we can not bear any more fights." (Record, 951-2.)

On cross-examination McNamara testified (Record, 968-9):—

"Q. Where did you meet him first?

"A. The first time I met him was in the lobby of the hotel.

"Q. The Main Hotel?

"A. Yes, sir.

"Q. Who introduced you to him?

"A. Nobody.

"Q. Did you walk up to him and introduce yourself?

"A. No. Jim Slankard told me in the convention hall that Mr. White wanted to make an appointment—wanted to see us and make an appointment at the Main Hotel.

"Q. Did you walk up to him and introduce yourself?

"A. No, sir. I did not.

"Q. Did he walk up to you and introduce himself?

"A. He shook hands with us up in the parlor of the Main Hotel.

"Q. Who was there when you shook hands?

"A. Jim Slankard.

"Q. Slankard is dead now?

"A. Yes, sir. I have been told that.

"Q. And you and he were alone when you met Mr. White?

"A. Yes, sir.

"Q. The National President?

"A. Yes, sir.

"Q. Did Slankard say, 'Mr. White, this is Mr. McNamara?'

"A. No, sir.

"Q. What did Mr. White say?

"A. He said, 'How do you do, boys,' and shook hands with Mr. (—) and Jim Slankard.

"Q. He seemed to know Slankard and seemed to know you?

"A. Yes, sir. Slankard told me he had talked to Mr. White that morning in the convention hall.

"Q. What was the next thing Mr. White said?

"A. Sir?

"Q. What was the next thing Mr. White said, after he shook hands with you and said, 'How do you do, boys?'

"A. 'How is things in Hartford?'

"Q. Then what did you say?

"A. I said, "All right, as far as I know.'

"Q. What was the next thing he said?

"A. He said, 'How is things in Prairie Creek?'

"Q. And you said what?

"A. I said, 'A little warm at Prairie Creek No. 4 mine.'

"Q. What did he say?

"A. He said he had been informed of that.

"Q. What was the next thing said in the conversation?

"A. He said, 'I have been talking to Stewart.'

"Q. He told you he had been talking to Stewart?

"A. Yes, sir.

"Q. Was Stewart there?

"A. No, sir.

"Q. Nobody there but you and Slankard and Mr. White?

"A. Yes, sir.

"Q. What then happened?

"A. He told me—what happened then? I don't understand your meaning.

"Q. Was anything else said at that time in that room?

"A. Yes, sir.

"Q. Was that down stairs that you had the conversation?

"A. That was on the second floor in the parlor.

"Q. What conversation did you have down in the lobby of the hotel?

"A. We never spoke a word.

"Q. Did you go up at the same time he did on the elevator?

"A. We went in the same elevator.

"Q. Nothing was said until you got up in the room?

"A. No, sir.

"Q. Did he motion to you to come on and get on the elevator?

"A. He nodded his head as he went up.

"Q. Oh, he nodded his head to you?
"A. Yes, sir."

Again (Record, 970):—

"Q. How long were you in that room?
"A. We must have been there fifteen minutes, anyway not longer than that.
"Q. No one there but you and Slankard and Mr. White?
"A. That is all.
"Q. What did Mr. White say after you got in there, after the conversation that you have related?
"A. White said, 'I have been talking to Mr. Stewart about the Bache-Denman trouble.'
"Q. Yes?
"A. Yes.
"Q. Is that all?
"A. Yes.
"Q. Is that the end of the conversation?
"A. No. You didn't ask me to repeat the rest of it. Shall I repeat the conversation?
"Q. Yes.
"A. He said, 'I have been talking to Stewart about the Bache-Denman trouble.' He said, 'Stewart informs me that they can produce coal,' something to that effect. He says,—let me get it straight, because I don't want to——
"Q. How is that? I beg your pardon. What is that?
"A. He said, 'If Bache-Denman is permitted to ship scab dug coal on the market,' he said, 'it is going to force the other operators to close their mines down or scab their mines, because they can't meet competition,' or words to that effect.
"Q. What did you say in answer to that?
"A. I didn't say a word.
"Q. Did Slankard say anything in reply to that observation?
"A. No, sir, he didn't say a word."

Again (Record, 971-2):—

"Q. Did you come down together?

"A. No, sir, we had more conversation. He said, 'I don't want the National Organization mixed up in this, because we have got a big burden now. We have got West Virginia and Colorado, and it is a big expense, and we don't want any more expense in Arkansas.' He said, 'You boys have taken care of this so far yourselves, now it is up to you.'

"Q. Was that the end of the conversation?

"A. Yes, sir.

"Q. Then did you come down stairs?

"A. Yes, sir, then we came down stairs.

"Q. Did he ask you to wait until he got down stairs, before you came out of the room to take the elevator?

"A. Yes, sir. He said, 'Let me go down first, on the first elevator, and you boys come later.'

"Q. He seemed to be kind of slinking and furtive about it, and afraid somebody would see him with you?

"A. Yes, sir, in a sense. He impressed me that he didn't want nobody to see us together."

The effect of this testimony of McNamara, if it is worthy of belief, is that John P. White, President of the International, expressed to him the opinion that: "If Bache-Denman is permitted to ship scab dug coal on the market" that "it is going to force the other operators to close their mines down or scab their mines because they can't meet competition," and that White further said to him: "We must prevent that coal from getting into the markets." McNamara further distinctly states that White told him: "*I don't want the National Organization mixed up in this because we have a big burden now. We have got West Virginia and Colorado, and it is a big expense and we don't want any more expense in Arkansas,*" and that "*you boys*" (meaning the District) "*have taken care of this so far yourselves, now it is up to you.*"

We submit that, giving the broadest view to McNamara's testimony that White not only did not by implication or otherwise, commit the International to the Prairie Creek affair (which he had no authority to do), but on the contrary notified McNamara that the International was not to be *"mixed up in this,"* or to have any burden or connection with it. The Circuit Court of Appeals very properly said upon this point:—

> "The Supreme Court has held the strike to be a local one. The International Organization by its constitution had settled the manner by which it would participate in a local strike. The Supreme Court in this particular case has held that President White had no authority to order and ratify a local strike; that only the board could do this. If no one but the Board could ratify a local strike, and if this was a local strike, both propositions being directly decided by the Supreme Court, then the purported statements of White, if made to McNamara, could not amount to a ratification, nor could they show a participation by the board. *In fact, it appears from one of the statements that White did not want the national organization mixed in the affair.*" (300 Fed. at p. 976.)

The so-called new proof of ratification by the testimony of McNamara was as follows: He says he saw Mr. White in an automobile in Hartford in the Spring of 1916 (Record, 962-3):—

> "A. I called Mr. White from the car and asked him if he remembered me, and I told him my name, and he said, 'Yes, I remember you.' I said, 'I would like to know when I will get my money that I was promised for this work,' and he said, 'I will take it up with the Board as soon as I can.'
>
> "Q. Did he say anything about Prairie Creek?
>
> "A. Yes, sir, we talked a little about the Prairie Creek trouble, and he said, 'The only mistake that was

made in that Prairie Creek trouble, if those two men had not been murdered you would not have had public sentiment against you, but on that it is against you a little bit here.'

"Q. Did you ever get paid any of this money?

"A. I never got one dollar that I know of, outside of some money I got in McAlester one time, and it was put down as Board Member's wages. It was to pay my expenses, along about the time that Jim Slankard and I were dodging the law here, after the big fight or riot, whatever you may call it on July 17th."

On cross-examination he testified as follows (Record, 972-4):—

"Q. And you told him you wanted to get your money, or would like to know when you were going to get the money?

"A. I asked him if he was going to see about me getting my money that they owed me. He said, 'I will take it up as soon as I return.' I believe those were his words.

"Q. Did you ever get any money from him?

"A. I never got a nickle from nobody.

"Q. You had no arrangement to get any money from him did you?

"A. From him?

"Q. Yes?

"A. Yes.

"Q. You failed to testify that on direct examination, didn't you? Had you overlooked that?

"A. Possibly I had forgotten that, yes, sir.

"Q. You had an arrangement to get money from him?

"A. Yes, sir.

"Q. When did you make that arrangement with Mr. White?

"A. When we were taking in the hotel.

"Q. When you were talking in the hotel?

"A. Yes, sir.

"Q. In May, 1914? That was part of the conversation upstairs, was it?

"A. Yes.

"Q. That was part of the conversation that you testified to a moment ago?

"A. I can tell you what was said up-stairs. I don't know just what you are alluding to.

"Q. I am alluding to the conversation. When was it you made an arrangement with Mr. White to get money from him?

"A. In the Hotel Main, when I was talking with him.

"Q. That was the time the special convention you testified to, when you met him in the lobby and went up-stairs with him?

"A. Yes, sir, that was the time.

"Q. What arrangements did you have to get money from him?

"A. Mr. White, when he rose up to go, said, 'Now you boys will not lose a day, and your expenses will be paid for every day you are in this trouble.'

"Q. What trouble were you in?

"A. It was the trouble I went to the penitentiary for.

"Q. In May, 1914?

"A. Oh, I didn't understand your question.

"Q. Oh, of course you didn't understand me.

"A. It was the trouble we had here.

"Q. When you saw him in the automobile next Spring——

"A. No, sir.

"Q. I am calling your attention to the time you saw him in the automobile next Spring?

"A. All right.

"Q. You asked him for money for the time you had been in prison. You hadn't been sent to the penitentiary in May, 1914?

"A. That was not in May, 1914. I told you that

after I came out of prison was when I saw White in the automobile.

"Q. But, Mr. McNamara, I asked you when you had arrangement with Mr. White to get money from him and you told me at the time of the special convention, May 18-23rd, 1914, at Fort Smith?

"A. No, sir.

"Q. Did you have any arrangements to get money from him then?

"A. It was generally understood that the National Organization was going to pay us for the time we lost. *It was generally understood we were going to be paid, and I thought the only man to go to would be White, to get it because he was the National President.*

"Q. You knew that the district was managing that fight?

"A. I know they did (they did) not.

"Q. You were captain down there, and you know the district paid all the relief?

"A. Yes, sir.

"Q. You knew it was a local strike, and the district managed it, didn't you?

"A. The district paid me money here at Fort Smith for my expenses.

"Q. Didn't the district have charge of that strike and pay the relief to the men there?

"A. No, sir. They paid some relief, but I don't know whether the National paid the money to the district or not, but what money I got I got from the district.

"Q. You got all the money from the district?

"A. Yes, sir."

JOHN P. WHITE testified as follows (Record, 2112):—

"Q. Now in 1916 were you at Hartford?

"A. I was in the Hartford Valley; yes, sir, I was in the town of Hartford about six years ago now.

"Q. Did you speak at that town?

"A. I delivered a public address there in the morning.

"Q. And did you speak at any other place in the Hartford Valley?

"A. At Huntington in the afternoon, and Bonanza in the evening.

"Q. Who was with you when you were on that trip?

"A. District President John Wilkenson, of District 21, at that time, and International Board Member William Dalrymple.

"Q. On that occasion did you have any meeting with a man named McNamara, or who was introduced as McNamara?

"A. I never knew Mr. McNamara. I had occasion just as I was leaving the hotel a crowd of miners, as I now recall, came and approached me about some grievance, and in line with my established policy I referred them to their district president, because I never interfered in the internal affairs of any district, in taking up of grievances, and II learned afterwards that among that crowd was one James McNamara, but to me I knew him not.

"Q. Was there any demand made on you by James McNamara for money?

"A. No, sir."

White denied the alleged conversation with McNamara, or seeing him at the Main Hotel, Fort Smith, in May, 1914, or any other time. (Record, 2109-10.)

This evidence contains no suggestion that Mr. White, as President of the National Organization, ratified the strike or torts at Prairie Creek.

McNamara first testified that he saw Mr. White in an automobile at Hartford, in 1916, after he had gotten out of the penitentiary, and that he asked White "when will I get my money that I was promised for the work," and then White said "I will take it up with the Board as soon as I

can." When he was asked if he had been promised this money he said that White told him at the Main Hotel at Fort Smith, in May, 1914, "you boys will not lose a day and your expenses will be paid for every day you are in this trouble." When asked what trouble he was in that White referred to he said the trouble he went to the penitentiary for (which was July, 1914), and when he was asked if he was in this trouble in May, 1914, he answered that he didn't understand the question, and then testified in answer to the direct question, what arrangement he ever had with White to get money that *"it was generally understood that the National Organization was going to pay us for the time we lost. It was generally understood they were going to be paid and I thought the only man to go to would be White to get it because he was the National President."* He further testified that the only money he got was from the district and that he had made requests of the district for money. His expectation of money from the National was thus based upon some rumor, taking all his testimony at its face value. Assuming that McNamara's improbable story is true, that he demanded money from Mr. White, in Hartford, in 1916, he said that White answered "I will take it up with the Board as soon as I can." There is no evidence that White ever took it up with the Board, or that he concerned himself further with the matter. The trial Judge took a correct view of this evidence. There was no effort to show either by McNamara or otherwise, that he ever pursued any real or fancied claim against the National Organization. On the trial it appears from his own testimony, as from that of Mr. Wilkinson, that the claim he insisted on was made to the district, that all the money he got or demanded was from the district.

We submit that the testimony of McNamara is at most merely cumulative and does not prove or tend to prove ratification by the International Organization, or even by White personally. White had no authority to bind the organization in any such manner. He could not have originally so bound it.

John P. White comes into Court a man of reputable char-

acter, honored not only by his fellow workers, but by his government; at the time of his testimony he was refereee for the miners and operators in Southeastern Kentucky and Tennessee; a man against whose integrity there is no suspicion, except that cast by the extraordinary story of McNamara, who, the plaintiffs-in-error say in their brief, served two years in the penitentiary, and is now living "up in the mountains from Norton, Virginia"; that he was found there and taken to Philadelphia where he remained a week, interviewed by Mr. Bache (Record 966-967). His testimony was that White came to him and another man, now dead, at the Main Hotel, in Fort Smith, in May, 1914, took them off secretly to a room upstairs, had the curious conversation related, asked them to wait until he got downstairs and seemed to be "slinking and furtive about it"—"didn't want nobody to see us together." (Record 971-972.) Testimony of this character can be tested not merely as to its substantiality, but as to its import, by examining what happened thereafter. Plaintiffs-in-error have had free access to the minutes of the National Executive Board. Not one word with reference to this strike has been found except the statement of Mr. White made at the meeting of May 4, and referred to by this Court. The financial accounts of the National Organization have been ransacked and a sweeping examination had by the plaintiffs-in-error of the files of the National Secretary-Treasurer; yet, not one dollar of financial aid was ever voted or given by the National Organization to District 21 or the locals engaged in the Prairie Creek strike. The files of the National President have been searched under orders from the Court (see former Record, page 301) in a vain effort to find some letter or communication bearing upon this strike. No demand was ever made by the District Organization for financial or other assistance from the National body. It is utterly beyond belief that if White had held any conversation with McNamara *that implied any plan or understanding of National support,* or if the alleged conversation had the meaning and effect imputed to it, that the locals and Dis-

trict 21 would not have called upon the National for assistance. There are some features of the miners' organization that must have impressed the courts: What they do, they do openly; what they say, whether in convention, conference or executive board meeting, is taken down, transcribed and published.

Counsel for plaintiffs-in-error have read from the exhaustive discussions (printed in book form) of District 21, concerning the Prairie Creek strike, and even concerning the law suit—read even from the conferences that the membership of District 21 insisted upon having in open forum with its attorney, Mr. Covington, and yet not one word has been offered or can be found to suggest that the District shared with the National Organization the responsibility for this strike, or that any of the members had such an understanding.

McNamara further said that all the money he got was from the District (Record, 974), and that in 1916 he wrote John Wilkinson, then President of District 21, demanding money (Record, 979). Wilkinson testified that while he was District President he received five or six letters from McNamara which had been destroyed, and that (Record, 2127):—

> "A. McNamara claimed that the Organization owed him money,"—the District—"and he said if he didn't get money for having done certain things in connection with the Prairie Creek trouble that he would not only do his best to destroy the Organization, but also threatened me with personal violence."

Under all the testimony upon this point the learned trial Judge was confronted with the question: What does it prove with relation to the liability of the International Organization? What substantial new evidence is thus presented to change the ruling and conclusions of the Supreme Court? It would seem obvious that the learned District Judge was justified in holding that the evidence of McNamara at most was but cumulative and that the evidence

on the former trial, with the reasonable inferences from the facts, presented to the jury the question of the connection of the National with the Prairie Creek affair, by reason of the approval or ratification of what had occurred, by John P. White, the President of the National; and the jury found for the plaintiffs. And on the former record the present plaintiffs-in-error urged that White, as President of the National, had committed the National Union to the approval and ratification of what was done at Prairie Creek. This Court held that John P. White, as President of the National Union, could not commit the National, because he, "The President had not authority *to order or ratify* a local strike," and the plaintiffs-in-error now seek to show that the National Union was liable because of the testimony of McNamara as to other or additional statements of John P. White, the President. White could no more commit the National Union in statements made to McNamara than he could by statements testified to on the former trial; and when this Court held (259 U. S. 396) that on the former trial the jury should have been "directed to return a verdict" for the International Union, the learned trial Judge could not do anything else but follow the conclusion of this Court.

Plaintiffs present the third sub-head to their sub-head 2, as to "competent new testimony," as follows (Brief, page 77):—

> "3. PUBLICATION BY THE EXECUTIVE BOARD OF JOURNAL EDITORIALS IN PURSUANCE OF WHITE'S PLAN."

This refers to the publications in the United Mine Workers Journal, but it is not claimed by Counsel for plaintiffs-in-error that anything new from this Journal appears in the present record, but they claim that under McNamara's testimony these articles took on a new aspect, and they are referred to at length and commented on without regard to the opinion of this Court as to their significance.

This Court said (259 U. S. 394):—

"Communications from outsiders and editorials published in the United Mine Workers' Journal, giving accounts of the occurrences at Prairie Creek, and representing that the troubles were due to the aggression of the armed guards of the mine owners, and that the action of the union men was justified, because in defense of their homes against night attacks, do not constitute such ratification by the Board or the President, after the fact, as to make the International Union liable for what had been done."

Counsel for plaintiffs-in-error say that there was no testimony in the former record that the persons who wrote or published these articles were parties to the conspiracy, or that they knew the artificial character of the self-defense propaganda they contained. With this excuse they again set out the article entitled "The Truth About Hartford." This article appears in the former record at page 2392.

It is now claimed by plaintiffs-in-error that this article in the Miners' Journal supplies the missing proof of ratification by the National Executive Board; that because, according to McNamara's testimony, President White knew the reports were untrue and because the Journal was published under the direction of the International Executive Board, the publication of the article known to be untrue was necessarily a ratification by the National Executive Board. This involves a bewildering theory spun from the testimony of McNamara. The evidence as to the authority under which the Journal was published was the same in this record as in the former one. It appears from Article XIX of the International constitution, and also from the publishers' announcement appearing in the Journal, which is found in the present record at page 268, and in the former record at page 505. What is now urged by the plaintiffs-in-error in relation to the significance of the publication of this article in the Journal was urged upon the previous appeal. It and others were offered for the purpose of showing ratification. It was argued then as it is argued

now that both the contributors and the publishers knew the articles were false. On page 982 of this record, they introduced from page 1462 of the former record, a communication from W. H. Gluck to the Journal of July 23, 1914, about the shooting-up of Camp Beulah or Frogtown; and it was the contention of plaintiffs at the former trial, as well as at the last trial, that Gluck with Slankard had himself shot-up Frogtown. This Court passed upon the evidence as to the shooting-up Frogtown and held that the charge of the defendants that this was done by Bache's guards was a ridiculous improbability. (259 U. S. 400.) There was also introduced in the former record certified copies of the indictments, pleas of guilty, judgments of conviction, payment of fines, for the announced purpose of showing that the articles published in the Journal were known to be false when published. On page 2473 of the former record, Mr. Drinker said to the Court, in explaining his offer of these criminal pleas and records, that he offered the evidence "solely against the National Union and not against the individual defendants." He further said (former Record, 2473-4):—

> "And President White was there talking about people who had pleaded guilty, who admitted that they did these things. And he told the convention that these people had been fined and imprisoned, and gave notice to the Convention all about it, and they must have known it anyhow. And then he went on and talked about their being persecuted, when he knew that these people stood up and admitted that they did those things. *And this is in connection with the ratifications* and we want to show what he was talking about. *And furthermore, in connection with the Journal articles,* the whole thing has been referred to."

Can it be said that at the last trial the plaintiffs for the first time attempted to justify their use of the Journal articles as a ratification, on the theory that these articles

were known to be false when published? Is it not apparent that the so-called new evidence is merely cumulative or rather that there is no new evidence upon this point, but an effort to secure a review of the ruling of this Court?

In the former record appeared other articles of the same tenor and offered for the same purpose: One entitled "Resistance to Lawlessness A Duty" (former Record, page 2407): another "Some Frivolous Charges," referring to indictments (former Record, page 2408); another entitled "Causes That Lead Up To The Trouble in Arkansas" (former Record, page 2410); another "Armed Employes Resented In Hartford Valley" (former Record, page 2412). It was claimed with reference to all of them that they were published, known to be false, and the articles in question were offered at the last trial for the same purpose, viz., to show ratification.

Nothing in this respect has been added to the former record. In their brief in this Court on the former appeal (143) counsel for the now plaintiffs-in-error say in relation to the Debs' article:—

> "The most striking thing about the above article is its flagrant and disgusting hypocrisy.
>
> "According to the overwhelming testimony, all the rumors of the depredations by the 'armed guards' and 'hired gunmen' had been deliberately and effectively circulated by the Union for the sole purpose of framing up an excuse to pull off the battle of July 17th, and to get the neighborhood not only to tolerate the assault on the mines, but to take part in it.
>
> "There can be no doubt whatever that the National Officers knew this. Certainly John P. White knew it and his smug denial at the trial of knowledge or participation in the Prairie Creek affair (given before we had secured the minutes of the Board Meeting of May 4th, which effectively revealed him in his true character), is in accord with the similar professions of virtue and innocence by the other responsible officials in the Union.

"If Debs did not know that the whole thing was a Union frame-up, as he probably did, certainly the editor who published the Article knew it.

"Indeed, even if the District and Local Branches were not legally agencies for the National association in the furtherance of its objects in conducting a strike—which we have demonstrated is the necessary legal effect of the constitution of the Union and the practice thereunder—the efforts of the National Organization to shield the local participants *by reiterating false and lying excuses for their conduct*, might well be considered in itself sufficient to implicate the National Union in the conspiracy." (Former Brief in Supreme Court, pages 143-145.)

Nothing in respect to the present contention of plaintiffs-in-error upon this point is new. It is the contention they have always made as to the import and value of this evidence. This appears not only from their brief and from the record of the first trial, but from the consideration given their contention by this Court, who specifically passed upon the question of the evidential value of the Journal articles. It considered them on the insistent claim of plaintiffs-in-error that they constituted a form of ratification by the National Executive Board; and such a contention only could have been made, and would only have been considered, on the claim that the articles were known to have been false when published. Here we have another instance of the interpretation and construction this Court has placed upon writings, and the obvious efforts of plaintiffs-in-error to secure a review of that interpretation.

In Roberts *vs.* Cooper, 20 How. at page 530 (Stat., page 481), it is said:—

"On the last trial, the Circuit Court was requested to give instructions to the jury contrary to the principles established by this Court on the first trial, and nearly all the exceptions now urged against the charge

are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this Court, that after a case has been brought here and decided, and a mandate issued to the Court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the Court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a Court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the Court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a Court to listen to criticisms on their opinions, or speculate on chances from changes in its members." (Case cited.)

In the present brief of plaintiffs-in-error (page 80), they say:—

> "The jury might properly find from the new testimony in the present record that the prompt publication by the National Executive Board of this official editorial, as well as the prior and subsequent publications of the other articles and communications which the present record contains, was the active part openly assumed by the National body in carrying out the conspiracy."

Practically the same statement is made in the former brief for the present plaintiffs-in-error, in this Court, at page 225, as follows:—

> "The Association through its Executive Board, its President and its official Journal actively encouraged, and thus participated in the illegal proceedings at Prairie Creek while these proceedings were going on."

This Court passed upon that question on the former record and nothing new in the evidence in the present record has been added thereto.

In a series of notes at page 77 and elsewhere, of their Brief, plaintiffs-in-error claim that there are in the record "sundry additional circumstances corroborating National participation."

The first of these is the testimony of one Searles, who worked at the Bache-Denman mines to the effect that Tom King, a district organizer, told him sometime in April or May, 1914, that the Prairie Creek strike was no outlaw strike and that "the District and National was behind it." The next is the testimony of one Holloman, section foreman for the Midland Valley Railroad, that he heard "a right smart talk from union men and they said it was too big a job and would have to be handled by the entire membership of the United Mine Workers," But these expressions on their faces are only conjectures or opinions and are certainly not binding on the National Organization.

It is characteristic that, in the face of this Court's opinion that only the National Executive Board could assume jurisdiction of this strike, counsel find in this curious testimony, evidence of the National participation. The ruling thought of counsel for plaintiffs-in-error is, that the purpose of the District Organizer is to organize open shop mines, that this is in the interest of the National Organization, and that "if undertaken by the District is done by it in pursuance of its duties to the National." If this conception of liability of the National can be sustained in this Court, then it would follow that a District Organizer, such as King, or unnamed "Union men" as testified to by Holloman, section foreman for the Midland Valley Railroad, can by such declarations as to the National, nullify the opinion of this Court, who said with reference to this question (259 U. S. at page 395):—

> "But it is said that the District was doing the work of the International and carrying out its policy and this circumstance makes the former an agent. We cannot

agree to this in the face of the specific stipulation between them that in such a case unless the International expressly assumed responsibility, the District must meet it alone. The subsequent events showing that the District did meet the responsibility with its own funds confirm our reliance upon the constitution of the two bodies."

It is then pointed out (in a note, Brief, p. 78), that the report of District Secretary-Treasurer Holt from April to October, 1914, contained the item "National Organizer, $801.26." This same report with the same item was presented in the former record (Former Record, 2468) and with its necessary inferences was considered by this Court. As a matter of fact, in this trial (Record, 1456), as on the former trial, the item was explained without contradiction by National Secretary-Treasurer Green as a payment to an organizer or organizers that had been loaned by District 21 for service in Colorado. Incidentally it may be remarked that this item does not appear as counsel claim under the heading "Expense of Prairie Creek Strike." (Record, 1003-4.)

We submit that there is nothing under this sub-head, further than a re-argument of the effect to be given to excerpts from the Mine Workers Journal, which were in the former record and duly considered by this Court.

Plaintiffs-in-error present (Brief 80) another sub-head to their main Point II, as follows:—

**"3. The enlarged powers of the National President by authoritative construction of the National Constitution by the National Executive Board."**

The provisions of the National Constitution which plaintiffs-in-error claim have been given an authoritative construction by the National Board, contrary to the construction put upon them by this Court, were as follows, to wit: Sections 3, 5, 7 and 31 of Article IX of the International Con-

stitution. All of the constitution, and especially the sections above referred to, were considered and construed by this Court on the former record, and it is now claimed that by reason of a minute of a Board meeting, the International Board had given a construction to these provisions of the constitution which was not in accord with the views of this Court, as expressed in its opinion. In the first place, we contend that the construction by this Court of this written constitution and of the powers to be exercised under it, could not be voided by the plaintiffs on the second trial of this case, but that such construction is the law of this case. But the record clearly shows that the plaintiffs-in-error are mistaken in their claim that the minutes of the International Board show any construction of the constitution at variance with that of this Court. Let us look at the testimony to which the plaintiffs-in-error refer. On page 2214, of the Record, it appears that Mr. Drinker stated to the Court that it was his purpose "to show the power of the National President between Board meetings," and introduced an extract from the minutes of the National Executive Board of September 13, 1915, entitled "West Virginia Case," as follows (Record, 2215-16):—

> "A further extended discussion was entered into regarding the appeal for financial assistance.
>
> "Board Member Haggerty consented to withdraw the appeal in favor of the report of the committee, with the understanding that if, between Board Meetings, the President of the International organization, under his prerogative as President, deemed it advisable to grant financial assistance to West Virginia, that could be done.
>
> "MR. DRINKER:—The other portion is on pages 63 and 64 of the other document, the portion marked, beginning 'the committee's report was read,' and so forth.
>
> ("Said excerpt from the minutes of the International Executive Board, so offered and received in evidence, is in words and figures following, to-wit:)

"The Committee's report was read by Board Member Harlin.

"BOARD MEMBER HAGGERTY:—In order that the matter be subject to first approval, I move that that part of the committee's report be tabled. That part sets down a definite policy on which we must act. I leave the matter in the hands of the President, so that he can act.

"PRESIDENT WHITE:—I have been lenient with my prerogatives and have always recognized that I was but the servant of the Board, who are all in turn the servants of the organization. I do not understand that the committee's report in any way with the prerogatives set forth in the constitution, devolving upon the President.

"BOARD MEMBER HARLIN:—The report of the committee as read expresses my opinion; no argument, whatever, could change it. So far, as I am personally concerned, I do not believe I would have the authority to attempt to curtail the well recognized authority of the President between Board meetings. In every case that arises between Board meetings, it is the prerogative of the President to exercise his judgment, subject to review by the International Board. In regard to this situation as it has been presented to us, this recommendation expresses my opinion; there has been no argument that would justify me in supporting a motion to strike out any portion of it. I intend to stand on the recommendation as read."

This was the whole of the minute and it shows no action by the Board, and was with reference to a particular situation existing in West Virginia, about which there was no explanation. It was an isolated instance and was dealing with one transaction. It had nothing to do with the Prairie Creek situation or with the Bache-Denman companies. It is not permissible to say what the circumstances were surrounding the transaction in question, whether it was a

strike over which the International already had assumed jurisdiction or not, although presumably it was. The Committee's report is not in the record. Haggerty moved that a "part of the committee's report be tabled." Harlin stated that "the report of the committee as read expresses" his opinion and he intends "to stand on the recommendation as read." President White stated that he was "but the servant of the Board." The matter involved an "appeal for financial assistance" for West Virginia. It seems that the Board took no action. If this meager testimony might indicate anything, it is that the President needed the Board's authority to act. Reference is made to the prerogative of the President between Board sessions, but these prerogatives are not only set out in the constitution but were considered by this Court (259 U. S. at pp. 383-4), and there is nothing in the minutes introduced to suggest that this construction by this Court, was not the construction employed by the National Board. It was said by counsel for plaintiffs-in-error, in offering this evidence, that it was in rebuttal to the testimony of Mr. White. It did not rebut Mr. White's testimony, but in this connection it is interesting to see what Mr. White said upon this point. This testimony was not proper cross-examination, but was brought out in the course of the cross-examination by plaintiffs-in-error (Record, 2120):—

> "Q. Between the conventions, has he (the President) not all the power of the executive board?
>
> "A. Only subject to the board's direction.
>
> "Q. But before the board meets, has he not all the power of the executive board, according to his prerogatives?
>
> "A. No. sir, he has not."

We submit that this minute of the International Executive Board, does not show any construction of the Constitution, and certainly not one in conflict with the views expressed by this Court.

NOTE:—See opinion of C. C. A., 300 Fed. at p. 976.

The fourth sub-head of Point II of plaintiffs-in-error is as follows (Brief, page 84):—

> **"4. The destruction was not a mere incident in a local strike, President White's order therefor being independent of the existence of any strike."**

Under this sub-head, the plaintiffs-in-error say (Brief, page 84):—

> "There is new testimony from which the jury might properly find not only that the issue involved was a National Issue and that the purpose of the conspirators was the furtherance of the basic National Policy" etc.

Here, the plaintiffs-in-error speak of "basic National Policy" of the National Union, as if their claim was something new, whereas in their "petition for re-hearing" in this case, at page 6, the plaintiffs-in-error, in referring to the joint conference debates in the former record, as well as in this, said that they "set the scale for the entire country," and explained "the origin and wide-spread understanding of the Union's policy to protect the Union operators," and in referring to the articles in the Mine Workers Journal, they further said (page 7):—

> "The record further contained numerous articles in the official journal of the Union 'published under the supervision of the International Executive Board' showing that over a long series of years as the result of practical experience with the menace of open shop competition, there had been firmly emplanted throughout the organization, including all the officers and members of District 21, the *basic idea* that by whatever means the shipment of open-shop coal should be prevented, for the reason that it endangered the relations

> between the Union and the Union operators by depriving the latter of sales in competitive markets which open-shop operators entered at a less cost."

This very question of alleged General Policy was in the former case and was passed upon by the Jury and considered by this Court on the former record, and there is nothing new in the record on this point.

On the first record, the present defendants-in-error claimed that there was a "lock-out" by Bache at his mines. The present plaintiffs-in-error claimed that there was a strike and this Court considered the question under the Constitutions of the National Union and District 21, and stated its conclusion that "it was a local strike within the meaning of the International and District Constitutions, so it was in fact a local strike, local in its origin and motive, local in its waging, and local in its felonous and murderous ending" (259 U. S. at page 412). The plaintiffs-in-error now say (Brief, 84): "In the present record it does not appear that any strike order was issued, either by the District or National Board or officers, or by any other authority. On the contrary, the Jury would be justified in concluding from the new testimony in the present record that no such order was given,"—and they further state that no such order was necessary under the provisions of Section 10, Article XIV, of the Constitution of the United Mine Workers of America. This article of the Constitution has the heading: "Local Unions. Local Unions how formed and governed," and Section 10 provides (Record, 218):—

> "Any member going to work in a non-union mine shall forfeit his membership and can be reinstated only by complying with the laws relating to such offense in the District where said offense is committed, unless such work is done with the consent of the President of the District where the non-union mine is located."

And on the second trial, Board member McLachlin testified that it was not necessary to have a strike order, as

Mr. Bache had done that himself, and it is now claimed by plaintiffs-in-error that the destruction of plaintiffs' property was not an incident in a local strike within the meaning, of the Constitution of the United Mine Workers. It is contended that the conclusion of this Court, that the strike was a "local strike" within the meaning of the constitutions of the National Union and of District 21, was not correct, although this conclusion was manifestly the finding of this Court, based upon its construction of the written constitutions.

Whether the cessation of work by the Union miners at such a mine is automatic or not, the result in fact and under the common sense construction of the Supreme Court *is a strike.* The mover may be the operator, the men may automatically be ineligible under their membership agreement to work further in the mine, but the result on their part is concerted cessation of work at their place of former employment; *in other words, a strike.* This section was before the Supreme Court and its construction is necessarily involved in the ruling of the Court. It does appear, however, from this provision that the District controls the matter of the reinstatement of union miners who may work in a non-union mine, and also recognizes that the District has the power in the first instance to permit them to work at non-union mines.

Whatever may be the responsibility of District No. 21, with regard to the strike under the circumstances set forth in this case, this Court has held that the National Union could not be held unless it had "expressly assumed responsibility" (259 U. S. at page 395), and there is no pretense in this case that the National Union ever took any action with regard thereto.

The evidence as to the character of this labor dispute appeared throughout the former record, just as it now appears in this record and this Court held that it was a "local strike" within the meaning of the International and District Constitutions. It appeared in the former trial and it appears equally in this record, that the strike was looked after by

the District and local officers; that they had charge and supervision of it, that they defrayed the expenses incident to it. This was proven by the plaintiffs, who indeed could not avoid the introduction of such proof. The National organization has initiated and directed many strikes, but this is not one of them.

The testimony of National Secretary-Treasurer Green (Record, 1955) was read from the former record, and he stated:—

> "Q. I want to ask you now Mr. Green, what if any moneys were paid out by the International Organization on account of the labor controversies between these plaintiffs' companies and the miners at Prairie Creek or in the Hartford Valley, either before or after the institution of this suit?
>
> "A. None whatever."

Plaintiffs-in-error in their brief (page 85) say:—

> "When an open shop operation was threatened, it was peculiarly within the President's province to see that a stop was put to it. By the past practice of his organization he was given a clear guide as to the methods sanctioned."

There is no justification in the record for any such claim. This Court held (259 U. S. 394):—

> "The President had not authority to order or ratify a local strike. Only the Board could do this."

And the only evidence on the subject, apart from the constitutions, was that of John P. White, who when questioned as to his authority as President in connection with the working of mines with non-union labor, testified as follows (Record, 2117):—

"Q. As a National President, an open shop mine mining 5000 tons of coal right next to a union mine, would not interest you a bit?

"A. No, sir, that would be up to the district of that jurisdiction, and District 21 was a united, organized district for years."

In order to sustain the position that the International was responsible, it must have been shown that it had "expressly assumed responsibility," and there is no evidence whatever in this record showing that the International Union, by past practice, had "given a clear guide as to the methods sanctioned."

In closing the discussion under this sub-head, plaintiffs-in-error refer to the case of Hitchman Coal and Coke Company *vs.* Mitchell, 245 U. S. 232, and quote in their brief at page 89 from the opinion in that case, as follows:—

> "The question whether Hughes had 'power or authority' to shut down the Hitchman mine is beside the mark. We are not here concerned with any question of *ultra vires*, but with an actual threat of closing down plaintiff's mine, made by Hughes while acting as agent of an organized body of men who indubitably were united in a purpose to close it unless plaintiff would conform to their wishes with respect to its management. * * *"

The plaintiffs-in-error did not complete the quotation, where it was said that the "organized body of men," referring to the International Union, had "lacked the power to carry out that purpose only because they had not yet persuaded a sufficient number of the Hitchman miners to join with them and hence *employed Hughes* as an 'organizer' and *sent him to the mine with the very object* of securing the support of the necessary number of miners." So it will be seen that the Court in that case found that the International Union had employed Hughes and had sent him to the

mine for the purpose of doing exactly the thing which the Court enjoined.

Therefore, we submit that the Hitchman case has no bearing upon the question now under discussion.

The fifth sub-head of Point II of plaintiffs-in-error is as follows (page 89):—

> **"5. The destruction was a step in a pre-existing conspiracy, of nation-wide scope, to which the National Body and District 21 were both parties."**

Under this sub-head, plaintiffs-in-error say (Brief, page 89):—

> "The complaint alleged a long standing nation-wide conspiracy by the National Organization of the United Mine Workers and all its District and local branches, the purpose of which was to monopolize all interstate traffic in coal and to subject it to the control of the Union and to prevent all such traffic in coal not mined pursuant to Union regulations, in which broad conspiracy the attack on plaintiffs' property was a step or part. The complaint also alleged that this attack on and destruction of plaintiffs' open shop operation in Arkansas in 1914 by defendants in itself constituted a conspiracy in restrain of interstate commerce, irrespective of the existence of the broader nation-wide conspiracy.
>
> "At the first trial plaintiffs did not attempt to show the development of such long-standing nation-wide conspiracy, but confined their proof to the smaller conspiracy in Arkansas in 1914, and offered no testimony to show the translation of the General Policy into actual practice prior to the attack on plaintiffs' mines in Arkansas in 1914. Plaintiffs then proceeded on the theory that, irrespective of the prior existence of a nation-wide conspiracy, and aside from the question of attempted monopoly, the commission by the District

> officers of the overt acts in Arkansas in 1914, was of itself sufficient to establish a cause of action under the Anti-trust Act against the National body."

This is a most remarkable statement of the issues presented by the plaintiffs on the former trial of this case. There has been no amendment to the complaint and the same issues were presented on the second trial and the complaint of the plaintiffs on the first trial of this case was not what is stated by them in the above quotation. This Court in stating what the charge of the plaintiffs was on the former trial of the case, said (259 U. S. at page 407):—

> "The plaintiffs charge that there has been and is a continuously operating conspiracy between Union coal operators and the International Union to restrain interstate commerce in coal and to *monopolize it* and that the work of District No. 21 at Prairie Creek was a *step in that conspiracy* for which it can be held liable under the Anti-trust Act."

On the first trial of this case, Judge Elliott in his charge to the jury said (former Record, 3235):—

> "Now the Federal Courts recognize the right of this Court under these circumstances to say what this Court believes in relation to the facts in this case and you are advised that this Court is of opinion that the facts in this case justify you in the conclusion overwhelmingly that it was the policy and therefore the agreement for years of this National organization to prevent mining of non-union coal for the unlawful purposes named in this complaint that it might not come into competition with Union mined coal; that there is no question in this Court's mind but that that strike was ordered down there for that purpose to prevent the mining of non-union coal in these plaintiffs' mines; that the strike was called by those who were the instrumentality of the greater organization, the general organization, the

> defendants, and their act was its act, and that they put into motion the force that destroyed this property, and that that force was put into motion for the purpose of preventing the mining of that coal, the shipping of that coal, the running of these mines."

The petition for re-hearing in this Court, after its decision, refers (page 6), to the Joint Conference Debates as showing "the widespread understanding of the Union's policy to protect the business of Union operators," and that the alleged conspiracy, as shown by these debates "set the scale for the entire country."

On the former record in this Court, the brief of the plaintiffs-in-error, at page 239, stated:—

> "Furthermore it is not the specific intent of the immediate participants which is important, but the collective intent, the intent of the Association, which inspired instigated and conducted the whole affair."

How is it possible for the plaintiffs-in-error, with any degree of ingenuousness, to now claim, as they do, that on the former trial they "did not attempt to show the development of such long standing, nation-wide conspiracy, but confined their proof to the smaller conspiracy in Arkansas in 1914, and offered no testimony to show the translation of the general policy into actual practice, prior to the attack on plaintiffs' mines in Arkansas, in 1914."

Such efforts of the plaintiffs-in-error to avoid the well-considered judgment of this Court, on the former record, cannot meet the approval of this Court.

Plaintiffs-in-error admit that they offered on the first trial, documentary evidence of the General Policy of the International Union, but they say that on the second trial, they "supplemented the documentary proof admitted at the first trial, as to the development of the General Union Policy, by much additional evidence from convention proceedings and Journal articles relating to the purpose of the organization of Colorado and Alabama, and by oral testimony of oper-

ators and of a former President of District 21, as to the purpose of the Colorado campaign against the open shop," and they complain that the District Judge rejected testimony offered as to the strikes in Alabama in 1908, in Irwin, Pennsylvania, in 1910-1911, in West Virginia in 1912-1913, in Colorado in 1913-1914 and in Vancouver in 1913-1914. We will hereafter discuss the rejection of this testimony by the Court, where we consider Point III of the brief for plaintiffs-in-error.

Plaintiffs-in-error then say (Brief, page 90), with reference to the second trial, "Here for the first time plaintiffs were prepared, and offered to prove the monopoly allegations in their case."

The fact is that they tried this case under the same complaint, which this Court said charged a conspiracy "to restrain interstate commerce in coal and to monopolize it." (259 U. S. at page 407.)

Plaintiffs-in-error now submit the same evidence and other evidence of the same inferential import, and contend that on the former record they made no claim as to "the monopoly allegations in their case," and it would be a strange proposition that they can put in their first record all of the facts before this Court, and now claim that they have made a new case under the Sherman Act because while the evidence may not have shown a conspiracy in restrain of trade, that the same facts *now* show a conspiracy to *monopolize* interstate trade. When this evidence was before the Court, on the former record, in a case under the Sherman Anti-trust Act, this Court must have considered and adjudicated *all of its evidential value*, under any provision of the Sherman Act.

It is said in the Brief of the plaintiffs-in-error, at page 91, that for the purpose of the present writ of error, they are entitled "to have the benefit of every fact which the rejected evidence would have established, as well as of every reasonable inference deducible therefrom," and they cite the case of Corsicana Bank *vs.* Johnson, 251 U. S. 68, 72. This case does not sustain any such proposition. It merely

announces the well-established principle that where peremptory instruction is given for the defendant, by a trial Judge, "where the evidence is in substantial dispute" that the Appellate Court must "adopt a view of it favorable to plaintiff." Our view is that where evidence is rejected, which was offered by the plaintiffs, and an exception is taken and this is made the basis of assignment of error in this Court, that the question presented is whether the ruling of the trial Judge was correct, and if the Court comes to the conclusion that the trial Judge was in error and that the evidence was admissible and its rejection was substantial prejudice to the plaintiff, the Court will reverse the case, and order a new trial, but there is no authority for the proposition that the Appellate Court will consider this rejected evidence or offers thereof, in connection with assigned error, upon other questions presented to the Court. The reason of this is clear. This Court will not consider evidence, which was not admitted by the trial Court, where there was no cross-examination and no opportunity to rebut such evidence, for the reason that it was not admitted. But they will consider the question of whether the trial Judge erred in his rejection of the evidence offered and that is the only question presented by the ruling of the District Judge.

In their Brief at page 101, plaintiffs-in-error make another remarkable statement:—

> "On the first record the destruction of plaintiff's property appeared as an *isolated and sporadic event,* originated and carried out solely by the local members, pursuant to a private controversy, with which the National Body was only remotely concerned. The question there presented to this Court as to the liability of the National body was merely whether, in that particular case, these isolated acts were done with its specific authority and under its direction."

The best answer to this statement is found in the "Petition for Re-hearing" in this Court, where the present plain-

tiffs-in-error undertook to state what the former record showed, as follows (page 11):—

> "The Prairie Creek strike was not *sporadic*. It marched with and was of the fundamental, nation-wide, never-ceasing, relentless policy of the Union and all its Districts; viz, to protect its Union mines against 'unfair competition,' a policy essential to its expansion and evidenced by speeches and articles of its leaders."

How can plaintiffs-in-error contend that on the former record, they only urged that the Prairie Creek strike was a "sporadic event"?

## II.

## CLAIM OF PLAINTIFFS-IN-ERROR, IN THEIR POINT III, THAT CERTAIN OFFERS OF EVIDENCE TO PROVE THE NATION-WIDE CONSPIRACY AND MONOPOLY, WERE REJECTED BY THE DISTRICT COURT, BUT SHOULD HAVE BEEN ADMITTED.

The rulings of the Court complained of relate to certain documentary evidence, oral testimony and offers of counsel, and it will be necessary that we take up each assignment of error in its order. Plaintiffs-in-error under their Point III content themselves with the most general statement as to these offers, saying that "further extended discussion of the admissibility of the rejected offers is unnecessary," in view of the fact that under the preceding Points in their Brief, they have discussed parts of this rejected evidence.

Under the rules of this Court (Rule XXI) it is provided:—

> "When the error alleged is as to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected."

The rules of the Circuit Court of Appeals of the Eighth Circuit have the same provision. In specifying error under this Rule, it is necessary that the assignment of error should be specific and set forth definitely the evidence offered as to particular facts. It was also necessary that the offers should tender proof of particular facts, otherwise the Court could not determine whether the offers were material to the issue and no proper exception could be taken.

In the case of Railroad Company *vs.* Smith, 21 Wall. 255, this Court said, at page 261:—

> "Whatever may be the rule elsewhere, to render an exception available in this Court, it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case. If the exception is to the refusal of an interrogatory, not objectionable in form, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness *particular facts*, to which the interrogatory related, and that such facts were material."

We shall now take up the Assignments of Error as to the so-called rejected offers, in their order as they appear in the record (Record, 2327-2383).

### Assignment No. 3.

This assignment claims that the District Judge erred "in sustaining the objection of the defendants to the testimony of the witness H. L. Good relative to the strike in the Irwin coal field, Irwin, Penna., in 1910 and 1911." The assignment does not set forth "the full substance of the evidence" rejected, and there is no way by which the Court can identify the ruling or determine whether the evidence would have been material, as the assignment does not comply with the rule.

### Assignments Nos. 4 and 5.

It is claimed that the Circuit Court of Appeals erred in refusing to reverse the District Court in excluding an offer of proof by the plaintiffs, in connection with the witness Good and other witnesses.

These assignments set forth correctly the alleged offer of counsel for the plaintiffs (Record, 1831), but the offer was insufficient to enable the Judge of the District Court to pass upon the materiality of the evidence and the assignments do not comply with Rule XXI of this Court.

A reference to the record will show that no question to the witness was pending, that the statements by Mr. Drinker were arguments to the Court and did not indicate the particular facts which he proposed to prove. Moreover, the so-called offers, set out in these assignments were of the most general character, to wit: that they "were going to prove the allegations of the complaint" and "what happened in the Irwin strike," and that "there was a continuing conspiracy," and amounted to nothing in the nature of a proper offer of proof.

### Assignments Nos. 6, 7, 8, 9, 10.

These assignments of error all refer to questions asked the witness Good, concerning the strike in the Irwin field of Pennsylvania in 1910 and 1911, and they do not comply with Rule XXI of this Court, in that there is nothing to show what particular facts it was proposed to prove, nor do the assignments "quote the full substance of the evidence" rejected. Offers by counsel for plaintiffs-in-error set forth in Assignments 11, 12 and 13 refer to these same matters in the Irwin field.

### Assignments Nos. 11, 12 and 13.

The offer referred to in Assignment No. 11 is improper and insufficient since the plaintiffs merely offered to prove

that "in the years 1910 and 1911 a strike was conducted in the Irwin field of Pennsylvania" and that this strike was "endorsed by the National organization of the United Mine Workers." This may have, so far, complied with Rule XXI, but when they offer to prove "that the purpose of that strike was to organize the then open shop mines in that District for the purpose of protecting operators, operating Union mines in adjoining States," the offer does not state, and there is nothing in the assignment of error to show, what facts the plaintiffs were offering to prove, but only that they proposed offering evidence establishing a conclusion stated by them in the offer. The offer further proposed to show "that the strike was conducted with violence, intimidation and deliberately by the United Mine Workers for that purpose." They then offer to prove a conclusion, to wit: that "the National organization knew and approved of these matters" and that "this was a step in a nation-wide conspiracy conducted by the United Mine Workers in all of the districts and the members thereof, for the purpose of throttling non-union coal or open shop coal and keeping it out of interstate commerce." There are no particular facts stated in this, which the plaintiffs offer to prove, but they offer to prove conclusions and we submit that the offer is not in accord with the rule.

Further, objection was made to this evidence on the ground that if the Court permitted this evidence as to a strike, in the years 1910 and 1911 in Pennsylvania, the defendant would be required to offer evidence in rebuttal, showing, in detail, the actual condition in the Irwin field in these two years, and thus would be presented a collateral issue, involving a strike three or four years prior to the strike in Arkansas, and which could have no bearing upon the destruction of the plaintiffs' property in Arkansas in 1914, for the inference that the plaintiffs' property was destroyed by the National Union in 1914, in Arkansas, could not possibly be drawn from the fact that in 1910 the National Union had been guilty of violence and intimidation in the Irwin field in Pennsylvania.

Assignment of Error No. 12 is subject to exactly the same objections as to Assignment No. 11.

Assignment No. 13 is subject to the same objections, as Assignments Nos. 11 and 12, and in addition thereto, we submit that no proper offer of proof was made as the plaintiffs' counsel merely offered "to prove by this witness the facts alleged in paragraphs 15 and 22 of the complaint."

ASSIGNMENTS NOS. 14, 15, 16, 17, 18 AND 19.

All of these assignments refer to offers by the plaintiffs to prove articles in the Mine Workers Journal published in the year 1910, with reference to the strike in the Irwin field of Pennsylvania.

When these articles from the Mine Workers Journal were offered, objection was made thereto and the Court ruled that this was "an attempt to try a collateral matter," and it sustained the objection of the defendants. We submit that in this ruling, the Court was clearly right, and we will discuss this more fully in connection with offers of articles of similar character, from the Journal, relating to other strikes.

ASSIGNMENTS NOS. 20 TO 30 INCLUSIVE.

These assignments of error all refer to the ruling of the District Court in declining to permit Ballard S. Carney, a witness for the plaintiffs, to answer certain questions relative to the strike in West Virginia in 1912-1913. The questions which were asked Carney and the rulings of the Court thereon appear in the Record, pages 1849 to 1852. None of the above assignments comply with Rule XXI, and no statement appears as to what particular facts the witness would have testified to; and no evidence as to the strike in West Virginia in 1912-1913 could have been relevant with regard to the question of liability of the National Union for the injury in 1914 to the property of the plaintiffs. At page 1852 of the Record, counsel for the plaintiffs stated to the Court:

"I will say frankly, your Honor, that none of the testimony that I am considering now and will consider later, relates specifically to this Arkansas trouble."

ASSIGNMENT No. 31.

This assignment purports to state "an offer," but the record shows that it was totally insufficient upon which to base an exception. There was no witness on the stand for it appears at page 1852, before the offer was made, Carney, the witness theretofore on the stand, had been excused. An offer can only be properly made when a witness is on the stand to prove certain particular facts stated. Nor was the offer one to prove particular facts. The alleged offer was to prove that "the facts disclosed by the testimony of the witness * * * were on their face all of such a nature as to result in the inevitable conclusion that the strike there conducted (in West Virginia) was part of a fixed purpose and set design, by agreed upon methods, for the suppression by the United Mine Workers of America in combination with all its districts and members and local unions, to prevent non-union coal being shipped to other states in competition with that mined by union operators in those States." This offer is not to prove particular facts, but to prove conclusions stated by counsel, and was made after the witness had been excused and if facts had been presented as to the detailed conduct of a strike in West Virginia in the year 1912, such evidence would not have been relevant and proper in this case. The offer was not sufficient and proper upon which to base an exception and an assignment of error.

ASSIGNMENTS NOS. 32 TO 36 INCLUSIVE.

These assignments refer to the rulings of the trial Court in excluding articles from the Mine Workers Journal in the years 1912, 1913 and 1914, relating to strikes in West Virginia, Vancouver and Colorado. The articles offered did not tend to prove what plaintiffs claimed, and were not

material and relevant to the issue in this case, but presented a collateral issue and from these articles no inference could be properly drawn, as to the liability of the International Union for the injury to plaintiffs' property in Arkansas in 1914.

These articles disclose that there were conflicts between the armed guards and the strikers and purport to be communications giving correspondents' views of the situation in the various territories, where the strikes referred to, were in progress. By no method of reasoning, however, can these articles be said to prove a monopoly, or tend to connect the International Union with the strike at Prairie Creek. To insist on such inference from this testimony would be to abandon the domain of legal proof and to enter upon a blind speculation.

It cannot be contended that this testimony would prove directly a conspiracy in restraint of commerce in West Virginia, Vancouver or Colorado. It was no more proof of a conspiracy under the Sherman Anti-trust Act in the territories where these strikes existed, than the testimony in the former record was proof of such a conspiracy at Prairie Creek. On the most extreme contention, it would still have to be inferred that these strikes in West Virginia, Vancouver or Colorado were in violation of the Sherman Act; and upon that inference must be based the additional inference that by reason of a similarity of torts, a conspiracy in restraint of trade, for which the International Union was responsible, existed at Prairie Creek in 1914. We submit that this testimony was not material or relevant and that the double inference therefrom could not properly be drawn.

In the present case, these offers of proof came clearly within the rule stated in 2 Chamberlayne on Evidence, Section 1029, at page 1228, as follows:—

> "The requirement that the logical inference styled a presumption of fact should be a strong, natural and immediate one brings as a corollary the rule that no inference can legitimately be based upon a fact the

> existence of which itself rests upon a prior inference. In other words, there can be, in the great majority of cases, no presumption upon a presumption. On the contrary, the fact used as the basis of the inference, the *terminus a quo* so to speak, must be established in a clear manner, devoid of all uncertainty."

In the case of United States *vs.* Ross, 92 U. S. 281, this Court said, at page 283:—

> "They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain. When circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Evidence, p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very fact in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences."

If the plaintiffs had been permitted to proceed in accordance with their so-called "offers," they would have introduced into the case a multitude of collateral issues. On any theory the defendants would have been entitled, and required for their protection, to go into the causes of these labor controversies, extending back four years prior to 1914, and prove the real facts which underlaid these struggles. No party is required to take proof against him

lying down. If an inquiry into either the facts concerning the strike in the Irwin field, Paint and Cabin Creek in West Virginia, or Colorado, or the attitude of the miners' therein, were permitted on the part of the plaintiffs, certainly it would have been proper for the defendants to go into the true facts and circumstances as they existed. There have been Senate investigations of the labor conditions resulting in these strikes of which the Court may take judicial knowledge, at least for the purpose of noting the scope of the inquiry in each case. The evidence taken covers many thousand pages. Apart from the inherent irrelevancy of such testimony, it is evident that the trial Court must be allowed some discretion in the premises. At the former trial, Judge Elliott excluded these offers of proof. (Former Record, 625-627.)

ASSIGNMENTS 37, 38, 39, 40, 41 AND 42.

These assignments charge that the trial Court erred in sustaining objections to certain questions asked their witness, Pete Hanraty (Record, 515-522), to wit: (1) what is a local strike? (2) Is a strike against an attempted open shop, a local strike? And (3) would starting up of a mine non-union with a production of 4,000 tons a day "affect the relation between union miners and union operators in District 21"? No offer appears in connection with these questions, and the assignments do not comply with Rule XXI, as there is no statement as to what the evidence would be. Later, the witness, Hanraty, was re-called (Record, 569), and certain alleged offers of proof were made, which are the subject of Assignments Nos. 43 and 44. (Record, 570-571.)

ASSIGNMENTS NOS. 43 AND 44.

Hanraty, who had been on the stand, was excused (Record, 534) and thereupon counsel for the plaintiffs read three depositions, namely: Arch Caldwell (Record, 540), Ewings Thomas (Record, 547), and J. Curtis Bohannon

(Record, 566). Thereupon, Hanraty was re-called and examined as follows (Record, 569):—

> "By Mr. Drinker:
>
> "Q. Mr. Hanraty, have you heard the testimony of the last three witnesses?
>
> "A. Yes, sir.
>
> "Q. Now, state whether or not a strike involving the question that this strike was over, as testified by the witnesses, and carried on in the manner described, is a local strike or not?"

Thereupon, an objection was sustained to this question and the plaintiffs made the offers of proof set forth in these two assignments of error (Record, 570-571).

The obvious effort by these offers of proof was not merely to ask this witness to construe the Constitutions of the International Union and of District 21, but to repose in him the judicial function of construing these written instruments in the light of the testimony *which he had heard from certain witnesses,* on the stand. In fact, the result was to create of this witness a Court of Review of the opinion and ruling of this Court.

We submit that the matter was concluded by this Court's construction of the Constitutions of the International Union and District 21. But if evidence was proper, the vice of the inqury proposed, and of the offers of proof, is pointed out by Taft, Circuit Judge, in the Circuit Court of Appeals of the Sixth Circuit, in the case of Manufacturers' Co. *vs.* Dorgan, 58 Fed. 945, as follows:—

> "The eighth assignment of error is based on the action of the Court in refusing to allow the following question: 'You have heard the testimony in this case about the autopsy? Answer. I have. Question. In your judgment, from that testimony, doctor, would you say that the autopsy was such as to enable a physician to state with any degree of certainty the cause of the death of Mr. Dorgan?' This question

was clearly incompetent, because it asked the witness, who was a physician, to make his own inference as to what the evidence of the other witness tended to show, and then, upon such inference, to give his opinion. To properly elicit his opinion as to the character of the autopsy, and its usefulness in showing the cause of the death, counsel should have stated the scope and character of the autopsy as he understood it, so that the jury, in weighing the answer of the witness, could know exactly upon what facts it was based."

The depositions form no basis for the opinion of the witness, even if such an opinion were competent and proper, *and these very depositions were in the former record and before this Court.*

Caldwell had never mined coal, but went to Prairie Creek in April, 1914, to serve as a guard, and testified to the riot of April 6th. Thomas was a miner brought in from Tennessee and ran a boarding house at the Prairie Creek mine, and testified to the battle of July 17th. Bohannan was a guard at the Prairie Creek mine, and testified that rocks were thrown at him and other guards at the Midland station in June, 1914. Upon the testimony of these three witnesses, to which Hanraty's attention was drawn, he was asked to base his opinion as to whether or not this was a local strike. We respectfully submit, that if it were proper upon this evidence for Hanraty to form an opinion, he could equally well reach his conclusion after having heard read a chapter from the Koran.

### Assignments Nos. 45 and 46.

These two assignments of error do not comply with Rule XXI of this Court; they are not discussed in the Brief for the plaintiffs-in-error and are apparently abandoned.

### Assignment No. 47.

This assignment does not comply with Rule XXI of this Court, and in addition thereto, the question asked the wit-

ness required him, in order to answer the same, to give his opinion as to the position taken by the operators and miners respectively, in the joint conference proceedings of the Central Competitive Field. He had previously identified the books containing the Joint Conference proceedings, including the debates, and these books were used on the theory that they were a full and complete transcript of the debates.

The question asked of the witness would have required him to give his opinion as to the import of the debates and would have been improper in any event, and especially in view of the construction given to these debates by this Court. (259 U. S. at page 408.)

### Assignment No. 48.

This assignment does not appear to have been discussed by the plaintiffs-in-error in their brief, and is apparently abandoned. It refers to the ruling of the trial Court in rejecting an extract from the report of the National Secretary-Treasurer in 1906, stating the amount of money in the hands of the National Treasurer, as well as the amount of funds belonging to the various Districts and the locals. This evidence was obviously collateral and irrelevant, and in no wise connected with the matters involved in this case, and if admissible for any purpose whatsoever, was cumulative in its character.

### Assignments Nos. 49, 50 and 52.

These assignments are not discussed in the Brief of the plaintiffs-in-error and were expressly waived in their Brief in the Circuit Court of Appeals, at pages 336-337.

### Assignment No. 51.

This assignment is not discussed in the Brief for the plaintiffs-in-error. In the Circuit Court of Appeals it was admitted that the record contained other testimony on this point. (Brief, C. C. A., page 330.)

### Assignment No. 53.

This assignment of error is not discussed in the Brief of the plaintiffs-in-error and is apparently abandoned. The alleged offer of proof referred to an extract from the proceedings of the special convention of District 21 in 1915, and a statement made by Webb Covington, Attorney for that District. This appears at page 1819 of the Record, and immediately preceding pages which contain numerous extracts that were admitted, the one in question being merely cumulative; and the Court's ruling was "I will not allow it at this time." (Record, 1819.)

### Assignments Nos. 54 and 55.

Both of these assignments fail to comply with Rule XXI of this Court. They are not discussed in the Brief of the plaintiffs-in-error and are apparently abandoned.

We submit that there was no error committed by the District Court, in its rulings as to the rejected offers, covered by the assignments of error above referred to.

## III.

## PLAINTIFFS-IN-ERROR ASSERT, IN THEIR POINT I, THAT THERE WAS SUFFICIENT EVIDENCE FOR SUBMISSION TO THE JURY ON THE QUESTION OF DEFENDANTS INTENT TO INTERFERE WITH INTERSTATE COMMERCE.

This point of plaintiffs-in-error is addressed to the question as stated by this Court, whether the record showed that the injury to plaintiffs' property was "in pursuance of a conspiracy to restrain and monopolize interstate commerce," to which conspiracy it is charged by the plaintiffs-in-error, that the International Union and District 21 were parties.

We have heretofore discussed, under our Point I, the

question of whether the International Union "initiated, participated in or ratified," the injury to plaintiff's property. We shall now discuss the question of whether this record shows that a conspiracy in violation of the Sherman Anti-Trust Act in fact existed and whether District 21 and its associates destroyed the plaintiffs' property "in pursuance of a conspiracy to restrain and monopolize interstate commerce."

On the former record, this Court held that no such conspiracy was shown and our contention is that there is no substantial difference between the former record and the present record upon that question.

In discussing this question, we feel that the best service we can render to the Court, is to consider this record in the same manner in which the former record was considered by this Court. Upon this branch of the case, this Court stated the question as follows (259 U. S. at page 396):—

> "*Fourth.*—The next question is two-fold: (*a*) Whether the District No. 21 and the individual defendants participated in a plot unlawfully to deprive the plaintiffs of their employees by intimidation and violence and in the course of it destroyed their properties, and, (*b*), whether they did these things in pursuance of a conspiracy to restrain and monopolize interstate commerce."

The same twofold question as stated by this Court is now presented in this record.

In passing upon subdivision (*a*) of the question as above stated, this Court reviewed all of the facts, which are practically the same in this record, and concluded that the record showed that District 21 was engaged in a plot to deprive the plaintiffs of their employees by intimidation and violence in the course of which the properties of the plaintiffs-in-error were destroyed. The record upon this subject was reviewed by the Court from pages 396 to 403 of its opinion (259 U. S.), and we must accept as settled by this

Court, its answer to the first, (*a*), subdivision of the twofold question stated.

The second division of the twofold question as stated by the Court was, whether District 21 and the individual defendants, (*b*), "did these things in pursuance of a conspiracy to restrain and monopolize interstate commerce."

This Court said (259 U. S. at page 403):—

> "(*b*) It was necessary, however, in order to hold District No. 21," (and this is equally liable as to any alleged party to the conspiracy), "liable in this suit under the anti-trust Act, to establish that this conspiracy to attack the Bache-Denman Mines and stop the nonunion employment there, was with intent to restrain interstate commerce and to monopolize the same, and to subject it to the control of the Union."

This second division of the question, the Court answered in the negative, holding that the record showed that the plot in which District 21 was involved, was not directed to the restraint or monopoly of interstate commerce.

In its opinion this Court reviewed the evidence on the former record which "consisted of a history of the relations between the International Union and the Union coal operators of certain so-called competitive Districts from 1898 until 1914"; and referred to the debates in the conferences between the Union miners and the Union operators; to the fact that in the general convention of 1904 a local Union from District 21 submitted a Resolution approving the action of the National Board as to the strike in Colorado, and setting up that if Colorado was permitted to work nonunion that it would "would work almost unsurmountable and incalculable damage to District No. 21, as it would be an unjust competition in the same commercial field and could with very little effort undersell and supersede us in the Oklahoma and southwestern Kansas markets." This Court referred (page 405) to the speech of John Mitchell in 1904; to the speech of W. B. Wilson in 1906, referring

to the question of "competition" in coal; to the fact that in 1910 Bache was a union operator; to the strikes in Colorado and Ohio fields in 1913-1914, which had been carried on by the International Union, and concluded by saying (259 U. S. at page 407):—

> "The foregoing will enable one to acquire a fair idea of the national situation, shown by the record, in respect to the mining and sale of coal so far as it bears upon this case and upon this state of fact. The plaintiffs charge that there has been and is a continuously operating conspiracy between union coal operators and the International Union to restrain interstate commerce in coal and to monopolize it, and that the work of District No. 21 at Prairie Creek was a step in that conspiracy for which it can be held liable under the Anti-Trust Act."

This Court then says that "coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such," and concludes from its review of the record as follows (259 U. S. at page 408):—

> "What really is shown by the evidence in the case at bar drawn from discussions and resolutions of conventions and conference, is the stimulation of union leaders to press their unionization of non-union mines not only as a direct means of bettering the conditions and wages of their workers, but also as a means of lessening interstate competition for union operators which in turn would lessen the pressure of those operators for reduction of the union scale or their resistance to an increase."

The Court in its opinion (259 U. S. 393), reviews the Constitution of the National Union and of District 21, and refers to the speech of John P. White, after he had heard of the trouble at Prairie Creek on April 6th; to the fact of

the speech made by White, in May at a special convention of District No. 21 at Fort Smith; to the fact that Stewart, the President of District 21, was sent to the penitentiary and pardoned, and that White, the National President, thanked the President of the United States for this, and appointed Stewart to a position on the District Committee, which the Court says shows White's "sympathy" with the riot of April 6th, and "a lack of respect for law." This Court also referred to the fact that the strike at Prairie Creek "came exactly within the definition of a local strike in the constitutions of both the National and the District organizations." The Court refers to the speeches of Stewart, President of District 21, to the burning of the car of coal which was loaded and "billed to a town in Louisiana," and thus concludes its review of the record, by a statement as to how the difficulties at Prairie Creek originated, and the character thereof as follows (259 U. S. at page 411):—

> "Bache's breach of his contract with the District No. 21 in employing non-union men three months before it expired, his attempt to evade his obligation by a manipulation of his numerous corporations, his advertised anticipation of trespass and violence by warning notices, by enclosing his mining premises with a cable and stationing guards with guns to defend them, all these in the heart of a territory that had been completely unionized for years, were calculated to arouse a bitterness of spirit entirely local among the union miners against a policy that brought in strangers and excluded themselves or their union colleagues from the houses they had occupied and the wages they had enjoyed. In the letter which Bache dictated in favor of operating the mines on a non-union basis, he said, 'To do this means a bitter fight but in my opinion it can be accomplished by proper organization.' Bache also testified that he was entering into a matter he knew was perilous and dangerous to his companies because in that section there was only one other mine running on a non-union basis. Nothing

> of this is recited to justify in the slightest the lawlessness and outrages committed, but only to point out that as it was a local strike within the meaning of the International and District constitutions, so it was in fact a local strike, local in its origin and motive, local in its waging, and local in its felonious and murderous ending."

The conclusion reached by this Court is as follows (259 U. S. at page 413):—

> "The result of our consideration of the entire record is that there was no evidence submitted to the jury upon which they properly could find that the outrages, felonies and murders of District No. 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce. The motion to direct the jury to return a verdict for the defendants should have been granted."

The present record contains exactly the same evidence as to the origin, character and purpose of the strike at Prairie Creek, as in the former record before this Court.

Plaintiffs-in-error, however, introduced a number of witnesses by whom they claim that *a new case* has been made upon the present record and that the plot in which District 21 was engaged was one "to restrain or monopolize interstate commerce."

In the brief, in introducing their discussion of the new evidence, plaintiffs-in-error say (page 13):—

> "At the first trial plaintiffs were unable to obtain any direct evidence, in the shape of testimony or declarations by the actual conspirators as to their purpose and motive in destroying the property. They were thus forced to rely, for proof of the intent essential to sustain their case, on *inference* which they sought to draw from proof of the general policy of the Union as developed in other fields."

Proof of intent by "inferences" from facts proven, was just as serviceable to the plaintiffs-in-error on the former trial, where they had the verdict of a jury in their favor, as if the conclusion supported by the inferences had been supported by *direct testimony* and this Court would never have reversed this case, on the former record, unless it had reached the conclusion that the facts shown, and the inferences therefrom, could not prevail against the opinion of this Court that the facts and circumstances surrounding the condition at Prairie Creek were "exactly within the definition of a local strike in the Constitutions of both the National and the District organizations." (259 U. S. at page 393.)

The above quotation from the Brief of the plaintiffs-in-error comes dangerously near admitting that what they term new evidence in this record, was merely cumulative, as they did admit in the Circuit Court of Appeals. (See *supra*, this Brief, page 6.)

On page 17 of their Brief, plaintiffs-in-error say that "the testimony in the present record may be divided into three classes," as follows:—

> "1. The testimony in the first record.
>
> "2. Cumulative testimony to fortify the jury in making findings already supported by competent testimony.
>
> "3. New and non-cumulative testimony to support findings hitherto unsupported by competent testimony."

As to the first two of these classes, it may be stated beyond question, that they do not change at all the case made on the former record. It is claimed, however, that the third class covers new testimony "to support findings hitherto unsupported by competent testimony," but which the plaintiffs-in-error claimed were supported by "inferences" from direct testimony in the former record.

We shall now discuss the alleged new and non-cumulative testimony which the plaintiffs-in-error claim supports the charge that the conspiracy was one in restraint of or to monopolize trade in violation of the Sherman Act.

This testimony is divided by plaintiffs-in-error into:—

> "(*A*) Circumstances indicating the existence of an actual intent to restrain commerce," and
>
> "(*B*) Declarations of the parties and direct evidence that such was their purpose."

The first of these classes of evidence, (*A*), the plaintiffs-in-error discuss under three subheadings, and we will now proceed to consider the same in their order, as follows:—

> "(1) THE DIRECT PARTICIPATION OF NATIONAL PRESIDENT WHITE OF ITSELF INDICATES THE PREDOMINANCE OF THE GENERAL POLICY AS THE PRIMARY ACTUATING MOTIVE."

So far as this heading refers to the testimony of McNamara, with relation to the liability of the National Union, this has been discussed elsewhere, in our Point I. Insofar as reference is here made by counsel for the plaintiffs-in-error to this testimony as showing that the so-called General Policy prevailed in District 21 and at Prairie Creek, we submit that it is but cumulative of the testimony that was in the former record, of White's statement to the Executive Board which showed "sympathy" with the purpose of the strikers and his speech at the Fort Smith convention in May, 1914, both of which were in the former record. It is also cumulative to the Resolution of a Local in District 21, set forth at page 405 of the opinion of this Court and in fact such like evidence ran all through the former record. As to the reference under this heading to the "potential annual output" of the plaintiffs' mines, this will be discussed under the next heading.

Plaintiffs-in-error claim (Brief, 22) that:—

> "(2) PLAINTIFFS' PRODUCT WAS SO IMPORTANT IN AFFECTING PRICES IN INTERSTATE COMMERCE THAT ITS DESTRUCTION BY DEFENDANTS INDICATES AN INTENT THEREBY TO RESTRAIN SUCH COMMERCE."

Under this heading, plaintiffs-in-error say:—

> "In its prior decision this Court stated that the maximum output of plaintiffs' mines 'in most prosperous times could not exceed 5000 tons per week,' in other words that this was the aggregate capacity of all the mines. This inference was erroneous, the Court having evidently confused the daily with the weekly tonnage.
>
> "The testimony of Mr. Bache and Mr. Denman in the former record as to the output and capacity of the mines covered but five of the mines, but was clear and explicit that their aggregate capacity was 5150 tons per working day.
>
> "The present testimony covers all seven of the mines in plaintiffs' operating group, including the Kali-Inla Mine in Oklahoma, all of which, the testimony showed, it was plaintiffs' purpose to start open shop as soon as the initial attempt got well under way, which fact was known to defendants and so stated in their Official Journal in the next issue after plaintiffs' Arkansas operation started."

And in a note on page 23 of their brief, they state:—

> "The complaint did not, as the Court stated, allege $465,000 as the value of the maximum potential output of the five operating mines, but as the minimum actual output of but four of them—see complaint, Record, page 10."

In the statement of the case by this Court, it is said (259 U. S. at page 348):—

> "The third amended complaint avers that of the nine companies, of which the plaintiff was receiver, and for which he was bringing his suit, five were operating companies engaged in mining coal and shipping it in interstate commerce, employing in all about 870 men, and mining an annual product when working to their

capacity valued at $465,000, of which 75 per cent. was sold and shipped to customers outside of the State. Of the five operating companies, one was under contract to operate the properties of two of the others, and four non-operating companies were each financially interested in one or more of the operating companies either by lease, by contract, or by the ownership of all or a majority of their stock."

The finding by this Court that the production of the Bache-Denman mines was "5000 tons a week" in comparison with the National production of ten to 15 millions tons a week, and the production of District No. 21 of 150,000 tons a week, was a fair statement of the former record.

At the last trial, plaintiffs-in-error undertook to prove that this Court was mistaken. The witness who particularly should have known the facts as to the production of the mines, was Mr. Bache, who owned and operated them and who testified both on the former trial and the last trial, and we now present his testimony at both trials on the question of production and capacity of his mines, as follows:—

*Mammoth Vein Coal Company's Mine:—*

"Q. About the first day of January, 1914, what was the capacity in production in tons per day or tons per year?

"A. About 600 or 700 tons a day was the capacity or was the production.

"Q. What was the capacity?

"A. The capacity I suppose was double that." (Former Record, 664.)

At the last trial he testified:—

"Q. What was the production per day of that mine (Mammoth Vein) in the beginning of 1914?

"A. Six or eight hundred tons. (Record, 1391.)

* * * * * * *

"Q. And under non-union conditions, if you had been permitted to operate open shop, with the increased production which would have resulted, and the decreased cost, taking into account all the factors that you could under these open shop conditions, how much coal could you have produced out of that mine?

"A. From 1,400 to 1,600 tons a day, by working two men in a room."

*The Prairie Creek Mine No. 4:—*

"A. Eight hundred tons was its maximum production. Its capacity, I would say, was about fifteen hundred tons." (Former Record, 666.)

At the last trial he testified as to Prairie Creek:—

"A. About the same, 800 tons a day was the maximum, or perhaps 900 tons a day in 1914—eight or nine hundred tons.

"Q. How many tons could it have produced open shop?

"A. It could have doubled its production." (Record, 1393.)

*Coronado Mine:—*

"Q. What was the production of Coronado, and the capacity, and how many men were employed on an average?

"A. About fifteen hundred tons, and that was both its capacity and its production." (Former Record, 665.)

At the last trial he testified as follows in respect to the Coronado mine:—

"A. Yes, sir, in 1914, 800, maybe six or eight hundred—I am distinguishing between what the mine actually produced, as well as I can, ON ANY PARTIC-

ULAR DAY in 1914, and what it was capable of producing.

"Q. And what could it have produced a day under open shop conditions?

"A. About 1200 tons a day—no, I will cut that—about 1200 tons a day. They had two men in a room in Coronado, and the increase in production would not have been so great under open shop conditions as at the other mines where we were only allowed one man." (Record, 1393.)

*Mammoth Vein No. 6:*—

"Its production and capacity were about the same, about 250 tons a day." (Former Record, 665.)

At the last trial he testified as to Mammoth Vein No. 6:—

"Q. What was the actual production?

"A. About 300.

"Q. What would the capacity be under union conditions?

"A. About 300.

"Q. And under non-union or open shop conditions?

"A. About 500." (Record, 1394.)

*Dallas Mine:*—

"A. I think its production was about 300 tons a day and also its capacity." (Former Record, 666.)

At the last trial he testified as to the Dallas Mine:—

"Q. And how much was its production at that time, if you know?

"A. About 600 a day, I believe.

"Q. And what was its capacity under union conditions?

"A. About 800.

"Q. And under open shop conditions?

"A. About 1200."

(Record, 1394.)

*Prairie Creek No. 3:—*

At the first trial he testified as to Prairie Creek No. 3, that it was connected underground with Prairie Creek No. 4, was not operated as a separate mine, and further:—

> "Q. Then in describing the production and capacity and working of Prairie Creek No. 4, did you include No. 3?
> "A. Yes, sir."
> (Former Record, 666.)

At the last trial, as at the first, the production of Prairie Creek No. 3 and No. 4 were considered together as one.

*Hoffman Mines:—*

The Hoffman mine was not being operated by the Bache-Denman interests in 1914. We quote from the former record, page 666:—

> "Q. Now, is there a mine known as the Hoffman mine?
> "A. Yes.
> "Q. Did you describe that?
> "A. No.
> "Q. Describe that.
> "A. The Hoffman mine was a mine I spoke of in connection with the purchase of land by Mr. Denman, Mr. Bryan and myself and we leased it to the Hoffman Coal Company and they operated the mine for a number of years, and they became insolvent and it went into the hands of a trustee and it was purchased, I believe, by us. No, no, it was not. It was leased by the trustee to the Central Coal & Coke Company and it was being operated by the Central Coal & Coke Company who paid us royalties, that is, paid the Hoffman Coal Company royalties in 1914. That was a slope mine and the equipment was the ordinary slope tipple with such appliances. The equipment was owned by the Central Coal & Coke Company, or the lessee."

At the last trial, Mr. Bache testified concerning the Hoffman mine as follows:—

> "Q. Take the Hoffman, the number of men employed,—you did not operate that mine?
> "A. Not in 1914, no, sir, we did not operate until the winter of 1915."
> (Record, 1394.)

It is plain from the record in both cases that the Hoffman mining property was under lease to another company. That company was the Central Coal & Coke Company and it operated it with Union labor. Its production or capacity at the time could not, by any reasonable argument, be said to have disturbed the Union Miners:—

> "Q. While you are speaking of the Hoffman mine, who operated it in 1914?
> "A. The Central Coal & Coke Company operated it at that time."
> (Record, 1388-1389.)

We have quoted above the testimony of Mr. Bache on the former trial upon which this Court made its findings, and that testimony has not been materially changed on the present record. Plaintiffs-in-error, not satisfied wih the actual production of the mines, undertake to swell the importance thereof by an artificial calculation of "the enormously larger potential production" of these mines (page 25, Brief), and it is stated that such potential annual output is 2,000,000 tons and is "equal to the average annual production of all the mines in Arkansas for the years 1913 and 1914." Upon this subject, the fancy of plaintiffs' counsel knows no bounds. As we have shown in the former record, there was presented to this Court practically the same evidence, not only of the "production of the mines" but of their "capacity" to produce under non-union conditions, but this Court declined to be led into the realms of speculation. If the potential production of the mines of plaintiffs-in-error

is to be considered, it would be upon the basis of closing all of the other mines in Arkansas, because the potential production of the plaintiffs' mines more than equalled all of the coal that was produced and could be sold from the mines in Arkansas.

In their estimate of the "potential" production of mines of the plaintiffs-in-error, counsel have not hesitated to include even the production of the Kali-Inla mine (Brief, page 23), which is one of the Bache-Denman properties located at Hartshorne, Oklahoma. But the Kali-Inla mine continued to operate Union, and has been continuously operated under a Union contract to this time. There was no disturbance there,—no strike and nothing to indicate that the Districts or Locals were concerned about it.

On the basis of the actual value of the output of the mines of the plaintiffs-in-error, as shown later in this Brief, the product of these mines was less than 5000 tons per week; and the volume of the production at the Prairie Creek mine, the only one being operated on July 17, 1914, was insignificant in relation to the National coal production. In estimating the production of mines, one cannot take simply the coal deposit, assume a certain number of miners, and state the result. There are other factors so constant in their bearing and yet so uncertain in their degree, that such problems become wholly speculative.

This Court knows something of the question of car supply and the recurrent stagnation of the markets. This last factor was distressingly true in the Southwest and has been so since the discovery there of oil and gas. On the Record, Mr. Bache makes a long statement of the discouraging market for coal since the discovery of oil and gas. We quote him from record, pages 1497-1498:—

> "On account of that competition of oil, and also on account of the discovery of gas, the market for this coal was decreased and the competition was quite intense for three or four years prior to 1914. And the capacity of the mines was greater than *the market would take care of* and everybody tried to sell their coal

against everybody else and the prices obtainable at that time were not satisfactory, at least not as satisfactory as they had been in the preceding period."

Another witness, relied upon by the plaintiffs-in-error on the last trial, was Mr. Scholz, formerly a Union operator in the Southwest, and now a non-union operator in West Virginia. On cross-examination, he testified as follows (Record, 1802-1803):—

"Q. You further stated this, did you not, in that statement, by way of an argument against the wage demand of the miners: I will quote: 'The discovery and development of vast fields of oil and gas has affected the price of coal from Omaha to the Gulf of Mexico. It is a fact that fifty-one per cent. of the steam in Kansas City is now being generated by oil and oil is largely displacing coal at Kansas City, St. Joseph, Topeka, Wichita and in the territory embraced within those lines, to say nothing of the situation with oil and gas in Oklahoma and Texas. The domestic coal sales have fallen off fully forty per cent. through the use of gas.' That is true?

"A. It is.

"Q. You have also made this argument to them as against the wage scale demand that they present: 'The lack of a market for the Oklahoma oil and the price of same is a menace today to the entire coal situation.' Is that true?

"A. As applied to District 21, it was and is."

The plain fact is that the strike referred to in this case was over the operation of the Pairie Creek mine with non-union labor. Nothing better illustrates this than the fact that at the Kali-Inla mine the union miners worked on without dispute or evidence of resentment. Bache never employed more than 150 men at the Prairie Creek mine, and there were, of course, not that many non-union miners at Prairie Creek, at the time of the battle. In the original

complaint, and again in the third amended complaint, the value of the shipments and sale of coal by Bache's operating companies, was placed at $465,000, annually. On the basis of $2 per ton, this annual output would be less than 5000 tons per week, and an average of $2 per ton selling price is low, since it is contended by plaintiffs-in-error that they proved on the record that the labor cost of their coal was $1.75 per ton (Brief, page 26).

It is evident from the above quoted testimony of Mr. Bache that in stating the maximum output was on *"any particular day in 1914."* It is absurd to take the maximum production of some particular day and multiply it by the working days in a year, or a week, for the purpose of arriving at the actual output of the mine, and Mr. Bache does not undertake to show the average production of his mine per year or per week. In ascertaining the annual production of a mine, it is necessary to take into consideration car supply, market conditions, how many days the mine worked in the year, and many other facts involved in the operation of a coal mine and the industry, and the effect of these factors upon the actual annual output of the Bache mines is reflected in the allegations of the complaint as to the value of the annual output.

When the opinion of this Court was announced in June, 1922, counsel for the now plaintiffs-in-error, secured a ninety-day stay to file a petition for re-hearing. In their petition for re-hearing in this Court, they presented the same contentions as to output of the mines and arguments which they are now urging here, and said, pages 13-14:—

> "The Court states that the complaint avers that the Bache companies were 'mining an annual product when working to their capacity valued at $465,000.' The Court is mistaken as to this.
>
> "The averment of the complaint is merely that prior to 1914 'the value of the annual shipments and sale of coal by said mines respectively exceeded the following:—

| | |
|---|---|
| Hartford Coal Company | $50,000 |
| Mammoth Vein Coal Company | 120,000 |
| Coronado Coal Company | 175,000 |
| Prairie Creek Coal Mining Co. | 120,000 |

And this was merely a conservative statement of less than the minimum value of the product theretofore mined of only those mines of the Bache-Denman Company which had been destroyed. It did not cover their potential capacity, nor did it cover all the Bache-Denman mines.

"Since Bache would have been able to reduce his cost by running open shop, it is not unreasonable to assume, *as the jury no doubt did,* that he could have so expanded his market as to run to capacity; that is to say, 1,200,000 tons for a year of 40 weeks or 1,560,000 tons for a year of 52 weeks. This is not insignificant in comparison with the 300,000 tons yearly production shown by the record in the Hitchman Coal case (245 U. S. 229, 233).

"Still less is it insignificant compared with the production of Arkansas or of District 21. His actual production was at the rate of from one-third to one-half of the total Arkansas production, and his mines, when working to capacity, were capable of displacing in the interstate markets three-fourths of the Union produced coal of that State. As compared to the production of 150,000 tons per week in the three states, composing District 21, Bache's capacity instead of being one-thirtieth, as the Court has assumed, was more than one-sixth. As between Bache and his competitors in the interstate field of District 21, and the Hitchman Coal Company and its competitors in the Central Field, the balance of comparative importance is overwhelmingly with Bache. There is no room to argue a local motive for the strike on the theory that Bache was comparatively insignificant. Actually and potentially he was a factor to be reckoned with, as the officers of District 21 well knew."

(We wish here to put at rest the suggestion occurring so often in their brief, that the case of Hitchman Coal & Coke Company *vs.* Mitchell, 245 U. S. 229, has any bearing on a case brought under the Sherman Anti-Trust Act, or that the production of coal in the Hitchman case and its effect upon interstate commerce was involved therein. In the Hitchman case, the jurisdiction of the Court was based upon diversity of citizenship, the conspiracy alleged was a common law conspiracy, and the Federal Court took jurisdiction alone upon the diverse citizenship of the parties. This appears in the opinion of the Court, and also in the dissenting opinion of Mr. Justice Brandeis, 245 U. S. 268, as follows:—

> "The District Judge undertook to pass upon the legality of the United Mine Workers of America under the Federal Anti-Trust Act; but the question was not in issue in the case. It had not been raised in the Bill or by Answer. Evidence bearing upon the issue was properly objected to by defendants and should have been excluded.")

The only fair construction to be placed on the judgment of this Court in overruling the Petition for Re-hearing is that the facts now urged, and which were set forth at length in the Petition for Re-hearing, were not considered by this Court as sufficient to change its conclusion that the production of the Bache-Denman mines "would have no appreciable effect upon the price of coal or non-union competition." (259 U. S. at page 412.)

In the case of United Leather Workers *vs.* Herkert, 265 U. S. 457, this Court refers to its opinion in this case, and says, at page 464:—

> "In United Mine Workers *vs.* Coronado Company, 259 U. S. 344, a coal mining company in Arkansas changed its arrangement with its employees from a closed shop to an open shop. The local Union resented the change and the avowed purpose of the Company

to protect non-union employees by armed guards. Violence, murder and arson were resorted to by the Union. Seventy-five per cent. of the output of the mine was to be shipped out of the state and a car of coal prepared for interstate shipment was destroyed by the mob of strikers and their sympathizers. It was contended that, as the result of the conspiracy was to reduce the interstate shipment of coal from the mines by 5000 tons *or more* a week, this conspiracy was directed against interstate commerce, and triple damages for the injury inflicted could be recovered under the Federal anti-trust law. But this Court held otherwise and reversed a judgment for a large amount on the ground that the evidence did not disclose a conspiracy against interstate commerce, justifying recovery under the law. The language of the Court was, page 407: 'Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In Hammer *vs.* Dagenhart, 247 U. S. 251, 272, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western R. R. Co. *vs.* Yurkonis, 238 U. S. 439.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce.' The same rule was followed in Gale *vs.* Vonnegut Machinery Co., 274 Fed. 66, 73, 74."

If this means anything, it clearly shows that this Court construed the Coronado case as holding that the question of mining and shipment of *"5000 tons or more a week"* did not bring the Coronado case within the Sherman Act, but that the record in that case, as the record now before the Court, showed that the controversy was directed to the mining of coal by non-union miners.

At page 25 of their brief, plaintiffs-in-error say, "In its prior decision this Court said that the saving from open shop operation 'was stated by plaintiffs' witnesses to be from 17 to 20 cents per ton.'" What bearing the discussion by the plaintiffs-in-error of this quotation from the opinion of this Court, has under the heading we are now discussing, we are unable to see, but the facts about this matter are that the plaintiffs-in-error made an effort to show that the saving from open shop operation would be greater than from 17 to 20 cents per ton, and that Mr. Bache would not reduce wages, and Mr. Freeze, who testified to lower production costs under non-union conditions, disclaims any thought of wage reduction—"He was not in sympathy with it." And yet the brief refers to the testimony of McAuliffe that the cost per ton would have been reduced 25 cents to 40 cents per ton under open-shop conditions. Mr. Puterbaugh put this at 50 cents per ton and Mr. Bache from 50 cents to 75 cents per ton. All of these witnesses took into consideration speculative factors, such as an undetermined increase in the output. On the former trial, it appeared that Mr. Bache dictated to the superintendent, Cameron, the contents of a letter to be written to Bache justifying his change to the non-union basis, in which it was stated that the then cost of production was $1.60 per ton and that this cost would be reduced under non-union operation to $1.042 per ton, or a reduction of 55.8 cents per ton. (Former Record, 720.) The same letter of Cameron is before this Court on this record. (Record, 1501-3.)

In their brief, the plaintiffs-in-error complain that this Court found that Bache was preparing "to pocket the profits that such a reduction made probable" (Brief, page 27). They now claim that they have prepared a record to inform this Court upon this question of business dealing, in other words, a question of human nature.

On the former record, this Court determined by a comparison of the National production of coal and the production of District 21, with the production of the Bache-

Denman mines that the production of the latter "would have no appreciable effect upon the price of coal or non-union competition," and we submit that there is nothing in the present record to change the conclusion stated by this Court.

Plaintiffs-in-error claim (Brief, 28) under the last subhead of their subdivision *A* of their Point I, that

> "3. ADDITIONAL CIRCUMSTANCES INDICATING AN ACTUAL INTENT TO INTERFERE WITH INTERSTATE COMMERCE."

They first (page 28) direct the Court's attention to the "coincidence of each of the attacks with plaintiffs' readiness to ship coal," and say that "though" this fact was "apparent at the first trial" it was "evidently not considered by the Court as of itself sufficient to warrant the necessary finding of intent." This alleged "coincidence" was presented, in large type, to this Court in the former Brief of the present plaintiffs-in-error at page 290, as follows:—

> "As we have heretofore noted the miners' object and plan did not contemplate any drastic action until the Company was ready to ship coal. It was this and this only that they were determined at all costs to prevent."

And in their petition for re-hearing in this Court (page 9) the now plaintiffs-in-error said:—

> "But in addition to this evidence there appears in the record the significant fact, from which the jury were entitled to draw all proper inferences, that each of the occasions when the property of the defendants-in-error was attacked coincided with actual preparation by the Companies for the immediate shipment of coal."

The facts as to this matter were presented to this Court and argued, and this Court gave to those facts, such weight as it thought proper.

The plaintiffs-in-error then proceed in their Brief (page 29) to discuss the above subhead (3) under sub-subheads, (*a*), (*b*) and (*c*), and we shall take them in this order presented in the Brief of the plaintiffs-in-error.

> "(*a*) Intimidation of Midland Valley Railroad Repair Gang."

Under this heading, the plaintiffs-in-error state that a "track repair foreman" of the Midland Valley Railroad, by name, Holloman, about the time that Prairie Creek Mine No. 4 "was about ready to ship coal, he and his gang got orders to repair the switch track into this mine" and "as they were starting to do so a number of Union miners accosted them roughly asking him 'if I was going to repair them tracks to haul the scab coal out over' and telling him he would never do it and that 'there will never one car of scab coal go out over this track.' "

Taking the evidence of Holloman at its full face value, the only thing appearing therefrom is that some Union man, at a time of great excitement, told him that he could not repair a side track into Prairie Creek Mine No. 4, and that "There will never one car of scab coal go out over this track." It appears that the track foreman was not interfered with in any way, and so far as the record shows, completed the repair to the track. But it is evident that whoever this rough man was, who addressed Holloman, that his attention was fastened upon "scab coal." We submit to the Court that this is nothing new, as the former record contained hundreds of pages of speeches and debates as to the prevention of non-union coal getting into the markets by the unionization of the mines, by preventing the coal being dug by non-union miners, and this testimony of Holloman is evidently of that class spoken of by the learned trial Judge as "little scraps of testimony here and there" which did not confuse him in his analysis of the case and his conclusion that the two records were substantially the same.

"(*b*) Failure to Molest Little Looper Mine."

The witness, O. T. Looper (Record, 683) testified also on the first trial (Former Record, 1148). The substance of his testimony is that prior to the Prairie Creek trouble he had been operating a small mine called by some, "a pigeon hole" and by others, "a slope"; that he employed eight or ten men on the open shop basis and in his view the constitution of "the United Mine Workers organization gives any man the right to operate a small place where he did not employ more than eight or ten men on the open shop basis; that the United Mine Workers had no jurisdiction over a place that was operated with eight or ten men."

The fact that he had been operating his "pigeon hole" as non-union prior to the Prairie Creek trouble appeared on the former record (Former Record, 1149) and it also appeared that before the Prairie Creek trouble, the mine passed to others and was then working under "an agreement with the United Mine Workers of America."

The result of this testimony was that Looper stated that the United Mine Workers had no jurisdiction over his mine under their constitution, although the Union miners visited, and talked to, his men, and it is evident that no trouble occurred at the Looper mine, because Looper did not break a contract with the United Mine Workers and then employ irritating guards around his mine while operating it non-union, which this Court found was one of the irritating factors in the Prairie Creek trouble.

"(*c*) The Independent Destruction of the Cars Loaded with Coal for Shipment to Other States."

Under this heading, counsel for plaintiffs-in-error refer to the billing of the cars as follows (Brief, page 30):—

> "It further appeared at the new trial that all these seven loaded cars were on the Midland Valley tracks which led to no coal consuming points in Arkansas, so that the interstate status did not apply merely to the one whose billing to Louisiana appeared in the first record."

It is apparent from this that counsel for plaintiffs-in-error, would have the Court understand that the first record presented testimony only as to the billing of one car, namely to Louisiana, whereas new evidence in the present record shows that all seven of the cars were billed to points outside of Arkansas, and yet the evidence upon which they rely as pointed out on page 72a of their appendix, shows that it is the testimony of three witnesses, Moore (Record, 1080), Peake (Record, 1195) and Pigg (Record, 1193), and a reference to this record at the points where these witnesses testified shows that their testimony at the last trial was read from the record of their testimony at the former trial.

Plaintiffs-in-error in their Brief, page 31, say:—

> "It is not our contention that if these cars had caught fire from the buildings, this circumstance of itself would convert the conspiracy into one in restraint of interstate commerce, merely because these cars were actually in interstate transit."

And in their appendix to their Brief (page 72a) plaintiffs-in-error say in support of the last statement:—

> "The uncontradicted testimony of the employees who hid behind the cars during the battle and who were the last to leave the property, was that none of the cars were on fire when they left, and the necessary inference was that the Union men set them on fire subsequently when the entire property was unconditionally in their possession and when it was totally unnecessary to destroy it as a means of protection for men who were already fleeing many miles away."

The implication from this is that the plaintiffs-in-error have put new evidence into this record showing that the destruction of the car was not as found by this Court (259 U. S. 411) "a part of the general destruction," full testimony as to which appeared in the former record. Plaintiffs-

in-error now cite the testimony of S. T. Brown, at page 1269, whose testimony on this trial was read from the former trial at pages 1699 to 1701 inclusive and 1707 to 1708 inclusive. They also rely upon the testimony of S. T. Moore (Record, 1162), but his testimony on the last trial was read from the former record at pages 1556 to 1562 inclusive. They also rely upon the testimony of Frank Pigg (Record, 1193), but this was read on the second trial from the former record at pages 1932 to 1934 inclusive. They also rely upon the deposition of John Weston (Record, 849) as new evidence, whereas John Weston was a witness on the first trial (Former Record, 1856), and testified concerning the burning and salvage of the cars.

Practically the only new testimony with reference to the cars, their use in the battle and the subsequent burning thereof, is by the witness, Edward Parrish, who said (Record, 907):—

> "There was a line of coal cars that ran from the tipple down there, I don't know, six or eight cars down to the north. There was scales or something down there, some building, I suppose it was a scales. The track ran right up against the structure, whatever it was. They were back behind these cars, and the Union Hall, as they called it, was out in front. I supposed they were trying to protect themselves behind these cars, but Schell had gone out two or three times to the tipple, and there seemed to be a space there about a car length at the end of the string of cars between the end of the string of cars and the tipple. As he came back about the third time there was a shot fired, and he jumped back in and he didn't go out any more, just stayed behind that. One of the boys said he wondered how good marksmen they were, and he put his hat on top of a car of coal, and it got a hole through it. He didn't want to put it on his head and put it up that high.
>
> "There were four of us. Harmon and a fellow named Malloy, and my brother and I, got in under the

cars, a string of wooden cars, and there was a dump there, something like as high as this desk, or maybe hardly so high, on each side of the track. We climbed down in there and those men were down towards the Union Hall, and they stood there and it seemed like they were looking for us. We were behind the wheels of the cars, and we had a good deep hole and wasn't in so much danger. Accidentally or some other way they put a bullet in under there, and it struck the car wheel and the rust and stuff flew up in my eyes, and I thought I was shot."

Plaintiffs-in-error say (Brief, page 31):—

> "The destruction of these cars plays the same part in this case as does the attempt to destroy the interstate railroad bridge in the case of United Mine Workers *vs.* Penna. Mining Co., 300 Fed. 965, 970, 971."

It appears from the opinion in that case that this was a local strike in Johnson County, Arkansas, lasting from October, 1910, until 1914, and the only incident during those four years which the record discloses as showing an interference with the facilities of commerce was the alleged dynamiting of this trestle, and the Circuit Court of Appeals declined to regard that as an index of the character of the struggle, but as a mere incident to it.

We therefore submit that the destruction of cars loaded with coal has no more evidential value upon this record than it did upon the former record when the Court passed upon this case.

Plaintiffs-in-error in their second subdivision (*B*), as to new testimony as to the intent to restrain interstate commerce claim that there were,

> "B. Declarations of the parties and direct evidence that such was their purpose."

This subject is discussed at page 33 of the brief of plaintiffs-in-error, and the first of their references is to the

testimony of J. K. McNamara. In discussing the testimony of this witness, plaintiffs-in-error state:—

> "It describes how the conspiracy was originated by National President White, and tells what was its primary and controlling object."

The frequency with which plaintiffs-in-error have asserted this charge against John P. White justifies a consideration of what is testified to by McNamara on that subject.

McNamara's testimony is that "along at the end of March or middle of March" he heard rumors that "Bache-Denman Company was going to start open shop," and thereupon he "went down to Prairie Creek, and there found a notice posted which instructed Bache employees to vacate their houses" (Record, 935). He then said that the notice further stated that "men would be furnished work that wanted to remain and not belong to the Union" (Record, 936), and that some days after his visit to Prairie Creek, "Little Pete Stewart heard from Big Pete Stewart," who was President of District 21 (Record, 937), and that "in pursuance of what was read in that letter" a meeting was called and held "two or three days before April 6th" (Record, 936). That while they were in the meeting, he received a telephone message from "Big Pete Stewart from Fort Smith" and that he was told to "disperse the meeting" (Record, 939), and that he and some other miners "held a meeting * * * that same night," and that he was "elected chairman of that meeting." (Record, 939.) He further stated that "the purpose of the meeting was to go to Prairie Creek that night and guard Prairie Creek," that "there were some rumors of trouble happening in Prairie Creek by the Prairie Creek guards at the mines." He further states that Little Pete Stewart had told him that he had a letter from Big Pete stating that "he couldn't do anything with Bache." He then states that a meeting was held "the night before April 6th" and that at that meeting, of which he was chairman "it was all arranged to go to Prairie Creek that night

*and make preparations for what we intended later on,"* and that he was "elected to manage the parade," and was "elected Captain." (Record, 940.)

That he then telephoned to Union men at "Midland and Huntington" to come to Prairie Creek "about twelve or one o'clock" on April 6th, and the next morning they "arranged a parade and marched out." It was this meeting and parade at Prairie Creek that resulted in the riot of April 6th. McNamara further testifies that at this meeting, he made a speech advising the miners to go to Prairie Creek "and not to use any violence of any kind and the men to come out and join the Union and quit scabbing," but that his advice to the miners to go quietly to Prairie Creek was "just a pretence." (Record, 941-2.)

He then says that when Big Pete Stewart telephoned him from Fort Smith, he got the telephone girl to listen in to the conversation, because he "thought there might be some lawsuit in which her evidence would be convenient," and he did this "because I realized in the very near future we were *going over to do what we did,* and we wanted to leave the impression with everybody possible that the District organization had nothing to do with it." (Record, 967.) The result of this is that McNamara testified that on the night of April 5th, at a meeting "it was all arranged to go to Prairie Creek that night and make preparations for *what we intended later on"* (Record, 940), and that two or three days before April 6th, being the date that Big Pete Stewart telephoned to him, he "realized in the very near future we were going *over to do what we did."* (Record, 967.)

He then testified that "along about the beginning of May," he went up to Fort Smith to see Pete Stewart and that Stewart told him that "he had been up to Kansas City and had a talk with White and he said they had arranged a plan up there to prevent Bache *from producing coal."* (Record, 950.) There are two significant things about this statement: first, the introduction of White into his story was one month after the time when the con-

spiracy had been formed with a realization that "in the very near future we were going over to do what we did," and second, that the alleged plan which Stewart said White and others had arranged was a plan "to prevent Bache *from producing coal.*" The next reference by McNamara to John P. White purports to give a conversation he had with White at Fort Smith, between the 18th and 23d of May, 1914 (Record, 951), in which White referred to Prairie Creek, and is alleged to have said, "Stewart told me that they cannot get enough men to operate the mine," and "if they do, we must prevent the coal from getting into the market" and, "because if Bache coal—scab dug coal—got into the market, it would only be a matter of time until every Union operator in that country would have to close down his mine or scab it, because the Union operators could not meet Bache competition." That White further said, "I want you to tell the men what I have told you, but don't tell them I have told you," and that, "he didn't want the National organization mixed up in this case" because, he said, "so far you have handled it, this part, and we have West Virginia and Colorado on our hands, and we cannot bear any more fights."

We submit that this testimony of McNamara, even if believed, is no justification for the charge that "the conspiracy was originated by National President John P. White," and further it furnishes no justification for the claim of counsel for plaintiffs-in-error, that it shows "specific intent" to restrain or monopolize interstate commerce, because the very statement of McNamara is that White's alleged plan was "to prevent Bache from producing coal."

We have heretofore discussed the alleged conversations between John P. White and McNamara under our Point I, to which we refer the Court.

Plaintiffs-in-error also claim that they have shown as new testimony, "Declarations by Defendants as to their Intention in Destroying Plaintiffs' Property." (Brief, page 37.)

The first of these witnesses is Wm. B. Tharel (Record,

1013), who testified that at or before July, 1914, he heard discussions by Union miners, and they were "talking about the Bache-Denman Company would ship coal into the foreign markets taking the place of Union coal" (Record, 1015) and "they mentioned several markets" Wyoming "talking about how long it took the cars to get back," and Minnesota, as to which "they said they couldn't never let that coal go down there; that it would affect the Union mines in Arkansas" (Record, 1015), and "they didn't seem to care how much water he pumped just so he didn't ship any coal."

The testimony of Dr. H. P. Routh (Record, 840), who says that during the Spring of 1914, he heard discussions "relative to the Bache-Denman Company's operations," that "you could hear it on all sides and every day. It was a perpetual thing and everybody was discussing it. It was discussed by everybody because it affected everybody's business,—mine as well as every one else's,—as to whether or not the mines operated." (Record, 841-2.) He further said that "there was a lot of discussion over dead work, but the principal thing was the hiring and firing of men. Their contention was that under non-union work a man had no assurance that a man was going to hold his job and could make no permanent arrangement for living and that kind of thing and another thing they were very much opposed to foreigners coming in. They were very much opposed to foreigners coming in and taking their places" (Record, 846), and further he said that "they all said that if Bache & Denman made a success of working open shop that the Central Coal and Coke Company would follow; that was the belief of the Union miners." (Record, 847.) He further testified as to what the miners believed would be the effect if Bache-Denman Company got started open shop: "Well, it would naturally, if Bache-Denman were going to operate open shop, it would force the other mines to attempt it in order to compete with it was the consensus of opinion of the organized miners that they were going to try to produce cheaper coal

than could be produced by Union miners; in other words, it was an attempt to change the scale; that is the way I understood it." (Record, 842.)

T. F. Lingo testified that in the Summer of 1914 at Hartford, "The only thing I heard them discuss was that they could ship * * * the two States (West Virginia and Alabama) could produce coal cheaper than the Union miners could and they could not sell it for less than what they could produce it at" (Record, 1029); that the general talk of the town of Hartford was that "they were not going to let Bache and Denman run open shop" and that the reason of this was that "they could produce coal" cheaper than the Union operators and on account they were in fear of these other companies "would want to run open if they let them." (Record, 1031.)

O. A. Brooks testified that he heard discussions among the miners during and prior to July, 1914, and that "the most discussed seems to have been the working time of Alabama and Kentucky over the Arkansas and Oklahoma field" (Record, 875), and "the chief objection seems to have been in preventing the work in the Hartford coal field," and "it seems that there was no objection as to the hoisting of water but objected to mining coal." (Record, 876.)

Elmer Bohannan testified that he had heard the miners "often say they would not allow scab coal to leave the Hartford field." (Record, 1052.)

T. A. Hall testified that there was a lot of discussion among the miners "as to mining conditions and mining matters" and that "everybody was interested directly in the way the (Bache-Denman) mines were operated," and "that was discussed." (Record, 865.)

Jake Ritchie testified as follows (Record, 703):—

> "A. I don't know that I could just exactly, more than that it was about open-shop. They didn't want open shops to work, and wanted people to join the union.

"Q. They wanted the open shops to join the union?

"A. Yes, sir, they didn't want them to work.

"Q. Did they say why they wanted them to join the union?

"A. Well, to keep all such coal as that off the market so this union coal could go on the market would be the biggest object.

"Q. That is to keep the open-shop coal off the market?

"A. Yes, sir."

On cross-examination he testified:—

"Q. Don't you know that the miners were interested in the wages and that that was all they were interested in?

"A. Yes, sir, they would be interested in the wages.

"Q. That was all they were interested in, was it not? The wages and working conditions?

"A. Give me that again?

"Q. That is all they were interested in, the wage scale and working conditions in the joint contract they had with the operators employing them?

"A. Yes, sir." (Record, page 705.)

G. W. Skow testified that he heard conversations by Union miners "relative to the open shop operation of the Bache-Denman Company at that time," and he remembers that remarks were made that "as soon as they started *hoisting* coal, the fun would begin."

F. J. Holloman testified that he heard discussions by Union miners "as to what the miners considered would be the effect on the Union if Bache-Denman got started open shop"; that "it would throw them out of work." (Record, 1013.)

A. W. McGee testified that he heard a miner say that the Bache-Denman Company "were hoisting a little water and it would break the Company up the way they were

getting it out," and that the Company "would never ship any coal from there" (Record, 765), and that he heard miners say that "if they let that mine down there work open shop, they would all be working open shop in a few days" (Record, 768).

J. L. Finney testified that "the open shop attempt" by the Bache mines was talked about by "practically everybody" and that "Union miners said they were not going to permit it" (Record, 838); that "if they allowed the Bache-Denman mines to run open shop, it would be but a short time until they would all be open shop" (Record, 838), and that they "would not permit that non-union coal to go on to the market in competition with Union coal" (Record, 839); that during the Bache-Denman trouble, the miners "discussed the situation that prevailed under non-union conditions" and they "were interested in their wages and working conditions," and that "if there were non-union mines, they would hire cheap labor and it would interfere with their negotiating a wage scale with the Operators' Association."

In referring to this character of testimony introduced by the plaintiffs, the Circuit Court of Appeals in its opinion (300 Fed. at page 979) said:—

> "Tharel was a storekeeper at Midland in 1914, and testifies as to hearing Union miners discuss the markets reached by the Bache-Denman Company, where Union coal was sold. Of course there was much discussion of this character. The Unions were determined to stop the production of non-union coal. They did not care, apparently, whether it interfered with interstate commerce or not. Their determined purpose was that Bache should not do business as a non-union operator, and naturally every phase of the matter was the subject of discussion among the miners."

The testimony above of new witnesses tends to show that when the Union miners gathered together they discussed the effect upon their Union wage scale of the production of coal by non-union miners, who worked longer hours,

under worse conditions and at lower wages, and the opinion seemed to be that if coal produced by non-union mines went into the competitive markets, it might require that their own Union mines should reduce their wages, or otherwise not be able to give them employment. Whatever the fears of the miners in this direction may have been, their struggle was a local one, as pointed out by this Court. And as to those fears—as to this consciousness on the part of District 21, its officers and members,—the testimony in the present record adds nothing new to the former record in this Court. Counsel for plaintiffs-in-error do not claim that they have injected into this record a new fear on the part of the miners, as to the relation and effect of non-union labor on their wages and employment. But they do say that they have produced new evidence that this fear was prevalent in District 21 and inspired the miners at Prairie Creek. This case from the start has been predicated on the contention that District 21, and the miners at Prairie Creek, were influenced by this apprehension,—it was necessarily their case and they came to this Court on that theory, with a verdict to sustain it. The above evidence, so far as it relates to competition and the markets in other States is simply cumulative. None of these witnesses testified to any purpose of the miners to interfere either with transportation or selling coal, but the testimony is to the effect that the miners would not permit the non-union coal of the Bache-Denman Company to get to the markets, and their efforts were to prevent this, *by stopping the mining of the coal.*

Counsel for plaintiffs-in-error rely upon the following passage from the opinion of this Court (259 U. S. at page 409):—

> "The very fact that local strikes are provided for in the union's constitution, and so may not engage the energies or funds of the National body, confirms this view. Such a local case of a lawless strike must stand on its own facts and while these conventions and discussions may reveal a general policy, the circumstances

> or direct evidence should supply the link between them and the local situation to make an unlawful local strike, not initiated or financed by the main organization, a step in an actionable conspiracy to restrain the freedom of interstate commerce which the Anti-Trust Act was intended to protect."

Plaintiffs-in-error claim that by the testimony reviewed above they have supplied the links referred to. It is to be noted that following this passage, and explanatory of what this Court meant, is cited the case of Loewe *vs.* Lawlor, 208 U. S. 274, with the statement of the Court that the present case is very different from it. In Loewe *vs.* Lawlor the boycott by the Hatters' Union, under the endorsement of the American Federation of Labor, was directed against the plaintiff's *sales* of hats in other states, and, "the direct object of attack was interstate commerce." Then the Court continues with a review of the following cases:

Eastern States Retail Lumber Dealers' Association *vs.* U. S., 234 U. S. 600; United States *vs.* Patten, 226 U. S. 525, and Ware & Leland Company *vs.* Mobile County, 209 U. S. 405; pointing out the difference between each of these cases where the direct object of attack was interstate commerce, or its instrumentalities, and where the object is, as in this case the obstruction of coal mining. This Court then said (259 U. S. at page 410):—

> "And so in the case at bar, coal mining is not interstate commerce and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct material and substantial effect to restrain it that the intent reasonably must be inferred."

The meaning of the Court in this quotation (where a restraint upon the mining of coal or the manufacture of com-

modities which may thereafter go into interstate commerce, may be converted into a conspiracy in restraint of interstate commerce by the intention of the parties, and the substantial tonnage of coal or commodities referred to), is well illustrated by the case of Pennsylvania Sugar Refining Company *vs.* American Sugar Refining Company, 166 Federal 254, in which case the American Sugar Refining Company was shown to have entered into an agreement for the purchase of the Pennsylvania Sugar Refining Company's plant in Philadelphia. The purpose of the purchase was to prevent the Pennsylvania Sugar Refining Company, which owned a large factory, from manufacturing sugar and distributing it in the states of New York, New Jersey and Pennsylvania, in direct competition with the American Sugar Refining Company. In that case there was no question about shutting down the factory of the Pennsylvania Sugar Refining Company by employees who were insisting upon the maintenance of a union scale of wages and union working conditions, but the sole object of the conspiracy was to prevent a large tonnage of sugar from being manufactured, transported, shipped and sold in a competitive territory; and it was held, and properly so, that the intention of the American Sugar Refining Company was to bring about a clear and direct restraint upon interstate commerce, and that was its sole object; but if the controversy had been between employees of the Pennsylvania Sugar Refining Company and that company over a scale of wages, and the union had determined that the factory should not operate in the manufacture of sugar unless it was operated by union employees, the intention would have been to interfere with the production, and not an interference with interstate commerce, which would have been merely incidental.

This point is further illustrated by the case of Gable *vs.* Vonnegut Machinery Company (C. C. A. 6th Circuit, 274 Federal 66, quoted with approval by this Court in the case of United Leather Workers *vs.* Herkert, 265 U. S. at page 265). The Vonnegut Machinery Company, an Indiana

corporation, doing business in that State, had contracts with the Toledo Machine and Tool Company, an Ohio corporation operating at Toledo, for the manufacture by the latter company of a large amount of machinery, which was to be delivered to the Vonnegut Company in Indiana, and which manufacture and delivery in another State was interfered with by a strike of the employees in the Toledo Machine and Tool Company's plant. The Court said (at page 74):

> "The fact that a shipment was interfered with only, because the goods were not manufactured, merely incidentally and indirectly affected interstate commerce."

There are many other cases illustrating the meaning of the passage above quoted in the Coronado case, which are cited in that opinion, and in the case of United Leather Workers *vs.* Herkert, 265 U. S. 454, hereinafter referred to.

In the case of Oliver Iron Company *vs.* Lord, 262 U. S. 172, this Court said at page 178:—

> "Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. (See cases cited, including Coronado case.) Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

Since the decision of this Court in the Coronado case, the Court has illustrated its views expressed therein by a later decision (in which the Coronado case is referred to), and the controlling thought of the Court is shown to be that expressions regarding the effect upon consumers in other States can be given no value whatever in determining whether or not restraint is placed upon interstate commerce.

In the case of Heisler *vs.* Thomas Colliery Company, 260 U. S. 245, which was a tax case, the Court said at page 258:—

"The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the State of its effect upon consumers in other States. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it, and a tax upon articles in one State that are destined for use in another State cannot be called a regulation of interstate commerce, whether imposed in the certainty of a return from a monopoly existing, or in the doubt and chances because of competition. The action of the State as a regulation of interstate commerce does not depend upon the degree of interference; it is illegal in any degree.

"We may, therefore, disregard the adventitious considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the products of a State that have, or are destined to have, a market in other States, are subjects of interstate commerce, though they have not moved from the place of their production or preparation.

"The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the

> shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production."

In the case of United Leather Workers *vs.* Herkert, 265 U. S. 457, the Coronado case (259 U. S. 344) is cited as a controlling case upon the subject now under consideration. In that case the Chief Justice stated the question involved, as follows (265 U. S. at page 464):—

> "The sole question here is whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was a conspiracy to restrain interstate commerce under the Anti-Trust Act because such products when made were, to the knowledge of the strikers, to be shipped in interstate commerce to fill orders given and accepted by would-be purchasers in other States, in the absence of evidence that the strikers interfered or attempted to interfere with the *free transport and delivery* of the products when manufactured from the factories to their destination in other States, or *with their sale in those States.*"

The answer to the question as stated is made clearly dependent upon whether (265 U. S. at page 464) "the strikers interfered or attempted to interfere with the *free transport* and delivery of the products when manufactured from the factories to their destination in other states, or *with their sale in those states.*"

In the present case we might paraphrase the above by saying, the sole question here is, whether a strike against coal operators, by their employees, intended by the strik-

ers to prevent, through illegal picketing and intimidation, continued mining of coal by non-union miners, and having such effect, was a conspiracy to restrain interstate commerce under the Anti-Trust Act, because such coal when mined was, to the knowledge of the strikers, to be shipped in interstate commerce to fill orders given and accepted, by would be purchasers in other states, in the absence of evidence that the strikers interfered or attempted to interfere with the *free transport and delivery* of the coal when mined from the mines to its destination in other states, or *with its sale in other states.*

In answer to the question stated above from the Leather Workers Case this Court said (citing the Coronado case, 259 U. S. 344):—

> "We think that this question has already been answered in the negative by this Court."

We submit that our paraphrase question has also been answered in the negative by the opinion in the Coronado case, and the Leather Workers Case, and that the same question is now presented to this Court.

In the Leather Workers case at page 465, the Court cites a number of cases dealing, as it said, with "State taxation upon the solicitation and acceptance of orders to be sent from one state to another," and then said (265 U. S. at page 465):—

> "It is a far cry from such cases to a strike to induce the employers to make better terms with their employees when no interference with *the transportation or future sale* of the goods by the strikers is attempted or shown."

Plaintiffs-in-error call attention to and quote copiously from the cases of Loewe *vs.* Lawlor, 208 U. S. 274, and Duplex Company *vs.* Deering, 254 U. S. 443, but in those cases, as stated by this Court in the United Leather Workers case (*supra*), it appeared that "members of labor unions

having a controversy with their employers *sought to embarass the sales* by their employers of the production of their manufacture in other states by *boycott and otherwise.*"

But this Court distinguished those cases in the United Leather Workers case, *supra,* by saying that the defendants in those cases "were held guilty of a conspiracy against interstate commerce because of their palpable intent to achieve this purpose by direct obstruction of that commerce," by destroying the *interstate sales by boycott.*

In concluding the discussion of their Point III, plaintiffs-in-error (Brief, page 51) assert that the present record does not contain proof which, on the former trial, this Court held to explain the "bitterness of spirit" in Hartford Valley against the Bache-Denman operations, and which was "ample to supply a full local motive for the conspiracy." (259 U. S. at page 411). The brief of the plaintiffs-in-error says (page 52) "The defendants offered no substantial testimony whatever on any of these matters." We submit that the proof upon this subject is the same in the present record as it was in the former one, and it comes from the plaintiffs' own testimony.

Mr. Bache testifies to the manipulation of his corporations (Record, 1440), merely adding at the last trial that his purpose was to put the mine in the control of the hundred dollar West Virginia corporation so that the aid of the Federal Courts in Arkansas might be invoked in the anticipated trouble. Bache still admits that he breached his contract and that he hired the guards and armed them (Record, 1443-1506), buying 40 or 50 rifles and several thousand rounds of ammunition (Record, 1506). It appears in the present record that Hartford Valley was completely unionized and that Bache anticipated trouble and advertised his anticipation of it. The plaintiffs-in-error prove the notices to the miners to vacate their homes (Record, 935). The testimony of the guards, Barnes (Record, 449), and Cheek (Record, 418), were read at the last trial from the testimony in the former record and they described the cables, lights and warning notices. The

same testimony of outside miners being brought in by Mr. Bache, is in the present record that was in the former record. It appears alike in both records that the mass meeting at the Prairie Creek school house on April 6th, was to protest Bache's repudiation of his contract with the Union, and that committees were appointed by that meeting to call on his superintendent to voice this protest, and to demand that the mines should be operated with Union labor. The only new evidence upon the subject in the present record is that of McNamara, who testified that neither he nor any Union man cared about the breach of the Union wage agreement (Record, 963-4) or the employment of armed guards at the mine (Record, 965). But this testimony we submit, is at variance with all the other evidence upon this point, including his own, and only illustrates McNamara's versatility and adaptability as a witness.

At the end of the case, the learned District Judge said (Record, 2238):—

> "I don't think it can ever be a different case, but while I think the conspiracy, at least to a certain point, is amply established, I do not think that there is evidence here that it was the direct purpose to interfere with or monopolize interstate commerce. It was for a different purpose and that was a mere incident to it."

On the hearing in the Circuit Court of Appeals, that Court in a unanimous opinion, approved the above quotation and said (300 Fed. at page 980):—

> "We are satisfied that there is no such substantial change in the proof here from that of the former case determined by the Supreme Court as to constitute a new case. It is the same case, and the law announced there is the law of this case. Even granting the record here to be stronger than in the previous trial on the question of the intent of the alleged conspiracy, yet in the light of the decision there, it fails to change the status of the International organization as to liability,

and fails to show that the direct intent of the conspiracy as to District No. 21 and its officers and subsidiary Unions was to restrain or monopolize interstate commerce. The judgment of the trial Court is affirmed."

We submit that the judgment of the District Court, approved by the Circuit Court of Appeals, should now be affirmed by this Court.

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DECEMBER 29TH, 1924.